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Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,
Petitioner

v.

SIMONA M. LOPES, CATHERINE E. WHITE, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fair Labor Standards Act ("FLSA") includes various "white-collar" exemptions intended by Congress to distinguish employees who are covered by the statute from those who are not. For seven decades, the pharmaceutical industry has classified its sales representatives as exempt from the FLSA's overtime pay requirement, in reliance on the administrative and outside sales exemptions. The Third Circuit has held that the administrative exemption applies to these employees. The Second Circuit held that neither exemption applies, according "controlling" deference to an amicus brief of the Department of Labor ("DOL"), which advocated that position for the first time. The questions presented are:

1. Whether the Second Circuit's holding that highly-paid pharmaceutical sales representatives are not covered by the FLSA's administrative exemption, in direct conflict with the Third Circuit, or the outside sales exemption, is contrary to the statute's text, purpose and DOL's long-standing regulations.

2. Whether an agency's break with prior interpretations of its regulations, advanced for the first time in an amicus brief, is entitled to heightened deference under *Auer v. Robbins* when it is inconsistent with the statute and its regulations, and causes unfair surprise by upsetting 70 years of settled expectations.

PARTIES TO THE PROCEEDING

Petitioner here and defendant-appellee below is Novartis Pharmaceuticals Corporation ("NPC").

Respondents here and plaintiffs-appellants below are a class of current and former pharmaceutical sales representatives employed by Petitioner in New York, California, and other states, certified by Order entered February 15, 2007 in *In re Novartis Wage and Hour Litigation*, Dkt. No. 18, 06-MD-1794 (PAC) (S.D.N.Y.), an action which consolidated two cases: *Lopes v. Novartis Corporation, et al.*, No. 06-Civ-2268 (S.D.N.Y.), brought by Respondent Simona M. Lopes and Carol Bollinger,[1] and *White v. Novartis Pharmaceuticals Corporation*, No. 06-Civ-02764 (C.D. Cal.), brought by Respondents Catherine E. White and Minel A. Hider Tobertga.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

NPC certifies that Novartis Finance Corporation, Novartis Corporation, Novartis Holding AG and Novartis AG are NPC's parent corporations. Novartis AG is the only publicly held corporation that holds ten percent or more of NPC's stock.

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[1] Carol Bollinger has dismissed all claims against NPC and is not a Respondent to this petition. Joint Stipulation of Partial Dismissal, *Lopes*, Dkt. No. 97 (Apr. 14, 2008).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Novartis Pharmaceuticals Corporation ("NPC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals (App. 1a-36a) is reported at 611 F.3d 141 (2d Cir. 2010). The district court's opinion (App. 39a-82a) is reported at 593 F. Supp. 2d 637 (S.D.N.Y. 2009).

JURISDICTION

The judgment of the Second Circuit (App. 37a-38a) was entered on July 6, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, the relevant regulations of the Department of Labor ("DOL") promulgated thereunder, 29 C.F.R. §§ 541.200-541.204, 541.500-541.504, and the relevant portion of the Preamble to the final DOL regulations promulgated in 2004 are set forth in the appendix to this petition (App. 85a-150a).

STATEMENT

This petition concerns the Fair Labor Standards Act ("FLSA") and two of its "white-collar" exemptions—for administrative and outside sales employees—which are critical to American businesses. The Second Circuit's decision has abruptly undone the regime put in place by Congress and enforced by DOL for seven decades, created a split between the circuits and fundamentally altered the legal standards businesses use to determine whether millions of workers are entitled to overtime pay. The court's reinterpretation of these exemptions—reached by deferring to an unsolicited DOL amicus brief—will change the balance between exempt and non-exempt workers under a statute that touches all corners of the U.S. economy. The decision imposes significant and unanticipated costs on American industry by subjecting businesses that utilize administrative and sales employees to substantial retroactive overtime liability. In addition to the broad national interests implicated by these circumstances, there are three specific issues that warrant review.

First, the decision below construes the FLSA's administrative exemption in direct conflict with the Third Circuit, which has held that pharmaceutical sales representatives ("sales reps" or "reps") are covered by the administrative exemption. The Second Circuit's decision also applies a rationale that has been squarely repudiated by both the governing regulations and the D.C. Circuit, in a case applying the same exemption in a different industry.

Second, the decision below recasts the outside sales exemption by imposing a highly technical standard that is contrary to the text and purpose of the statute and its regulations, and is at odds with interpretations by other circuits.

Third, these far-reaching interpretations of the exemptions resulted from the Second Circuit according "controlling deference" under *Auer v. Robbins*, 519 U.S. 452 (1997), to an amicus brief submitted, *sua sponte*, by DOL. The court granted this deference despite the fact that DOL's amicus views represented a sharp break from the agency's long-standing interpretations of these exemptions, as expressed in formal rulemaking. This "regulation by amicus brief" creates unfair surprise by upsetting long-standing expectations and will impose massive retroactive liability and cause fundamental changes in the pharmaceutical industry. The Court should address whether controlling deference under *Auer* is appropriate when an agency's informal interpretation alters the regulatory landscape in a significant and unanticipated fashion.

A. The FLSA and Its White-Collar Exemptions

The FLSA was enacted in 1938 as part of the New Deal to protect American workers from "substandard labor conditions". *Roland Elec. Co. v. Walling*, 326 U.S. 657, 669-70 (1946). Congress sought to "promote economic justice and security for the lowest paid of our wage earners . . . to protect this Nation from . . . wages too low to buy the bare necessities of life and from long hours of work injurious to health". S. Rep. No. 640, 81st Cong., 1st

Sess. (1949). The Act imposes minimum wage and maximum hour protections, including the requirement that employees be paid time-and-a-half when they work more than 40 hours a week. *See* 29 U.S.C. § 207(a)(1).

But "[t]he goal of ameliorating the uglier side of a modern economy did not imply that all workers were equally needful of protection". *Nicholson v. World Bus. Network, Inc.*, 105 F.3d 1361, 1364 (11th Cir. 1997). The FLSA exempts from its overtime requirement "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of an outside salesman". 29 U.S.C. § 213(a)(1). These white-collar exemptions were central to the statute. As DOL explained in 2004 following notice-and-comment rulemaking:

> The legislative history [of the FLSA] indicates that the [white-collar] exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay. Further, the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week[.]

Dep't of Labor, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22123-24 (Apr. 23, 2004) ("Final Rule").

1. DOL's 1940 Regulations

Early efforts to amend the FLSA to exclude all white-collar employees ceased with the general understanding that the "duties" test for these workers—one of the issues here—would be relaxed in the implementing regulations. Marc Linder, *Time and a Half's the American Way: A History of the Exclusion of White-Collar Workers from Overtime Regulation, 1868-2004*, 513-21, 678 (2004). Thus, the regulations adopted in 1940 defined an "administrative" employee expansively, covering any employee who "is compensated . . . at a rate of not less than $200 per month" and "whose work involves the execution under only general supervision of special non-manual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment". 29 C.F.R. § 541.2 (1940). A 1940 DOL report that issued along with the new regulations made clear that the exemption should cover broad categories of office workers and require the exercise of only minimal discretion. Dep't of Labor, Wage & Hour & Pub. Contracts Div., Report and Recommendations of the Presiding Officer (Harold Stein) on Proposed Revisions of Regulations, Part 541 ("Stein Report"), at 26-27 (Oct. 10, 1940). For example, the report explained that an executive secretary's ability "to distinguish between callers at the office" constituted the kind of "exercise of

discretion and independent judgment" that qualifies for the administrative exemption. *Id.* at 27.

Critically, DOL provided that where it was "difficult" to determine whether the "discretion and independent judgment" requirement has been met, "inclusion or exclusion should be determinable by reference to a completely objective requirement" which was to be "the payment of a stated salary". *Id.* at 26. This "salary criterion" was viewed as the "best and most easily applied test" for the exemption. *Id.*[2]

Further, the 1940 regulations defined an "outside salesman" as one "who is customarily and regularly engaged away from his employer's place or places of business in making sales within the meaning of section 3(k) of the Act". 29 C.F.R. § 541.5 (1940). The FLSA's broad definition of "sale", expressly incorporated by DOL in its regulations interpreting the outside sales exemption, "includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition". 29 U.S.C. § 203(k). The 1940 Stein Report explained that what was required was that the employee "in some sense make a sale". Stein Report at 46.

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[2] The $200/month salary set forth in the 1940 regulations, and described in this report as the line above which employees should qualify for the administrative exemption, is an amount equivalent to a current annual salary of approximately $37,000. *Dollar Times*, www.dollartimes.com/calculators/inflation.htm (last visited Sept. 23, 2010). NPC's sales reps earn an average annual salary of $91,500, two-to-three times that amount. *See infra* p. 10.

2. DOL's 2004 Final Rule

With the exception of periodic changes to the pay threshold, the relevant regulations remained largely unchanged for many years. Beginning in the mid-1980s, DOL undertook a review of the white-collar exemptions, which culminated in a 2004 notice-and-comment rulemaking. These revised regulations were "the subject of extensive public commentary for two decades", congressional oversight hearings and a 1999 General Accounting Office report, which recommended that DOL streamline and clarify the white-collar exemptions to better accommodate the modern workplace. Final Rule at 22124-25. Addressing a concern that the administrative exemption was "confusing and applied inconsistently" by DOL, *id.*, the agency simplified the test to focus on a non-exclusive list of factors to determine whether employees exercise "discretion and independent judgment", *id.* at 22143-44. This minimal test eliminated an earlier requirement that the exempt employee "customarily and regularly" exercise discretion. *Id.* In rejecting this requirement, DOL made clear that it was adopting "the definition of discretion and independent judgment to reflect existing federal case law," which required only that the employee's "primary duty . . . '*include*' the exercise of discretion and independent judgment". *Id.* at 22142-43 (emphasis added).[3] DOL stated its intent "to

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[3] DOL cited, as relevant case law, *O'Dell v. Alyeska Pipeline Service Co.*, which held that an inspector who exercised "*some* discretion and independent judgment during the course of his job . . . was [exempt]", 856 F.2d 1452, 1454 (9th Cir. 1988) (emphasis added), and *Dymond v. U.S. Postal Service*, which

eliminate outdated and confusing language from existing guidelines" and noted that "[f]ederal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment, although a case-by-case analysis is required". *Id.* at 22142-43.

The Final Rule also confirmed the breadth and flexibility of the outside sales exemption. The changes made to the regulations were minor, including a new "primary duty" test to determine whether an employee's duties were primarily outside sales. *See, e.g., id.* at 22160, 22161. The Preamble reaffirmed DOL's long-standing position that the outside sales exemption requires only that an employee "*in some sense*, has made sales". *Id.* at 22162 (citing Stein Report).

B. The Critical Role of Sales Reps in the Sale of Prescription Medications

Pharmaceutical companies must sell their products in accordance with the federal Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 *et seq.*, and its accompanying regulations, 21 C.F.R. Pts. 200-299, which prohibit these companies from transferring title to their prescription medicines directly to doctors or patients. *See* 21 U.S.C. § 353(b)(1). Instead, pharmaceutical companies utilize their sales reps to generate sales of medicines by persuading physicians to make the determination,

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held that the administrative exemption is met when the "employee's primary duty simply *includes* work requiring the exercise of discretion and independent judgment", 670 F.2d 93, 95 (8th Cir. 1982) (internal quotation marks and citations omitted) (emphasis added). *See* Final Rule at 22143.

in conjunction with their patients, to write prescriptions for the company's products. Sales reps visit physicians, educate them about particular medications, address concerns they have and ultimately close the sale by obtaining the physicians' commitment to prescribe those medications for appropriate patients. App. 42a; *Baum v. AstraZeneca LP*, 605 F. Supp. 2d 669, 671-72, 677-79 (W.D. Pa. 2009), *aff'd*, 2010 WL 1063935 (3d Cir. 2010).[4] Sales reps are often the only point of contact between doctors and pharmaceutical companies.

To gain physicians' commitments to prescribe, sales reps must develop a rapport with them, understand their questions and demonstrate how certain medications can serve the physicians' patients. To ensure compliance with Food and Drug Administration ("FDA") regulations, sales reps use detailed materials provided by the company for their presentations, but it is still up to the sales reps to "tailor their presentations to each individual physician based on such variables as the amount of time the physician allocates to meeting with the [sales rep]; the physician's patient base and prescribing habits and the [sales rep's] assessment of the physician's personality". App. 43a. "[Sales reps] are capable of mounting an impressively sophisticated and intense marketing pitch." *IMS Health, Inc.*, 550 F.3d at 46. Sales reps also have discretion to allocate a budget for appropriate meals

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[4] The function of sales reps is generally the same across the pharmaceutical industry. *See, e.g., IMS Health, Inc. v. Ayotte*, 550 F.3d 42, 46-47 (1st Cir. 2008); *Baum*, 605 F. Supp. 2d at 687; *Schaefer-LaRose v. Eli Lilly & Co.*, 663 F. Supp. 2d 674, 694 n.14 (S.D. Ind. 2009).

and educational seminars for physicians and their staffs, and to distribute free samples of medications in a strategic way to physicians. App. 43a.

That sales reps "succeed[] in inducing physicians to prescribe large quantities of brand-name drugs seems clear (even if the exact magnitude of that effect is not)". *IMS Health, Inc.*, 550 F.3d at 56. "Not only do visits from sales rep[s] increase drug sales, but they do so more than advertisements directed to physicians in professional journals or advertisements directed to consumers". David Orentlicher, *Prescription Data Mining and the Protection of Patients' Interests*, 38 *J.L. Med. & Ethics* 74, 76 (Spring 2010).

Sales reps work outside of NPC's offices. App. 44a, 67a-68a. They develop their own business plans and set their own schedules. App. 43a. Sales reps determine how often to visit particular physicians, but are expected to make a total number of sales calls each day. App. 44a. Their supervisors usually communicate with them electronically. App. 44a, 67a-68a. To fill sales rep positions, NPC seeks individuals who are college-educated, self-motivated and have the ability to work independently. App. 41a. When hired, sales reps are told that they are part of NPC's sales force and that they will be engaged in selling NPC products. *Id.* NPC provides sales reps with extensive training in sales techniques and other subjects relevant to NPC products. *Id.*

Sales reps are well-paid and their compensation is tied to sales of their products in their assigned territory. App. 44a. At NPC, sales reps average $91,500 in salary and commission and are eligible for

other performance-based rewards such as all-expenses-paid vacations. *Id.* The industry-wide median is more than $93,000.[5] Commissions represent 15-25 percent of a sales rep's salary at NPC. App. 41a, 44a. The position is considered one of the most desirable American jobs.[6]

Sales reps compose a significant part of the pharmaceutical industry's workforce. At NPC there are 6,000 sales reps out of 13,000 total employees. App. 41a. Overall, the American pharmaceutical industry employs approximately 100,000 reps.[7] NPC annually spends over $500 million on sales reps. App. 67a. Pharmaceutical companies spend billions of dollars on marketing directed at physicians—sales reps representing the vast majority of those expenditures. *IMS Health, Inc.*, 550 F.3d at 70 n.17 (Lipez, J., concurring and dissenting).

Comparing themselves to assembly line workers, Respondents claim that regulatory limitations make them nothing more than robots. App. 78a. But, as one court explained, "[n]o one can honestly say that a

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[5] Jennifer Merritt, Carolyn Bigda & Donna Rosato, *Young and Restless—top 20 jobs*, *Money Magazine* (2007), *available at* http://money.cnn.com/galleries/2007/moneymag/0703/gallery.bestjobs_young.moneymag/16.html.

[6] *See supra* note 5; *see also* Linda Wang, *Chemical & Engineering News, Employment Outlook—Prescription for Success in Sales*, Feb. 19, 2007, at 43-46, *available at* http://pubs.acs.org/cen/employment/85/8508employment.html ("With the good pay, flexible hours, and the strong business foundation it provides, it is no wonder that pharmaceutical sales is a popular job.").

[7] *See supra* note 6.

salesperson is effective simply by spitting out a memorized script; no one can imagine a company that would require rote adherence to planned words in any situation". *Baum*, 605 F. Supp. 2d at 685. Or, as the district court here noted, such assertions "do not begin to answer why or how a robot or an automaton could or should earn an average salary of $91,500 per year". App. 78a.

C. Historic Treatment of Sales Reps Under the FLSA

For decades it has been the universal "practice throughout the pharmaceuticals industry" to classify sales reps as exempt employees under the FLSA and thus not subject to overtime requirements. App. 10a. There is ample historic justification for this practice.

In 1945, DOL issued an opinion letter stating that a pharmaceutical company's "medical detailists" (as sales reps are also referred to), whose work was "aimed at increasing the use of [the company's] product in hospitals and through physicians' recommendations", and who maintained relations with doctors, were exempt administrative employees. Applicability of exemption for administrative employees to medical detailists, May 19, 1945, 2 Lab. L. Rep. (CCH) ¶ 33,093 (3d ed. 1946). In making its determination, DOL noted that the detailists worked "virtually without supervision", were paid more than the statutory minimum, did work "directly related to general business operations", used "their discretion and independent judgment" and had "skills or knowledge acquired through special training or experience". *Id.*

During the ensuing decades, DOL never repudiated its 1945 opinion or suggested that sales reps' job responsibilities had changed in a way that warranted reclassification. The first challenge to the sales reps' exemption came in 1982, in a private lawsuit. A federal district court held that, notwithstanding restrictions placed on the sales rep by her employer, the plaintiff's exercise of discretion and independent judgment qualified her for the administrative exemption. *See Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883, 886-87 (E.D. Pa. 1982). The court relied in part on DOL's 1945 opinion. *Id.* at 886 n.2. Until the present case, DOL had not expressed disagreement with *Cote* or with the industry's treatment of sales reps as exempt.

Recently, a handful of pharmaceutical sales reps have brought several suits challenging their exempt status. Just this year, the Third Circuit upheld the applicability of the administrative exemption, concluding that a sales rep's exercise of at least some independent judgment and discretion with respect to matters of significance satisfies the minimal test adopted by DOL in the 2004 rulemaking. *Smith v. Johnson & Johnson*, 593 F.3d 280, 285 (3d Cir. 2010). And a clear majority of the federal district courts to consider the issue have held that sales reps are covered by the administrative exemption as a matter of law or that the question was a triable issue of fact.[8] Similarly, the majority of federal courts

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[8] *See Jackson v. Alpharma Inc.*, No. 07-3250, 2010 WL 2869530 (D.N.J. July 19, 2010); *Baum*, 605 F. Supp. 2d at 686-87, *aff'd*, 2010 WL 1063935; *Schaefer-LaRose*, 663 F. Supp. 2d at 694; *Ruggeri v. Boehringer Ingelheim Pharms., Inc.*, 585 F. Supp. 2d 254, 277 (D. Conn. 2008); *Amendola v. Bristol-Myers*

have held that sales reps qualify for the outside sales exemption.[9]

D. Proceedings Below

Respondents are a class of current and former NPC sales reps, who brought two lawsuits in 2006 claiming that the FLSA and state law mandate the payment of overtime wages. The suits were consolidated in the Southern District of New York.

Squibb Co., 558 F. Supp. 2d 459, 477 (S.D.N.Y. 2008); *Cote*, 558 F. Supp. at 887. *But see Harris v. Auxilium Pharms.*, No. 07-cv-03938, slip op. at 5 (S.D. Tex. Sept. 28, 2010); *Jirak v. Abbott Labs., Inc.*, No. 07 C 3626, 2010 WL 2331098, at *4 (N.D. Ill. June 10, 2010).

[9] *See Christopher v. SmithKline Beecham Corp.*, No. CV-08-1498, 2009 WL 4051075, at *5 (D. Ariz. Nov. 20, 2009) (consolidated appeal pending in the Ninth Circuit); *Schaefer-LaRose*, 663 F. Supp. 2d at 688; *Baum*, 605 F. Supp. 2d at 686, *aff'd on other grounds*, 2010 WL 1063935; *Delgado v. Ortho-McNeil, Inc.*, No. SACV 07-00263, 2009 WL 2781525, at *5 (C.D. Cal. Feb. 6, 2009) (consolidated appeal pending in the Ninth Circuit); *Yacoubian v. Ortho-McNeil Pharm., Inc.*, No. SACV 07-00127, 2009 WL 3326632, at *6 (C.D. Cal. Feb. 6, 2009) (same); *Rivera v. Schering Corp.*, No. CV 08-1743, 2008 WL 6953955, at *3 (C.D. Cal. Aug. 14, 2008) (California law); *Brody v. AstraZeneca Pharms.*, No. CV 06-6862, 2008 WL 6953957, at *9 (C.D. Cal. June 11, 2008) (same); *Menes v. Roche Labs., Inc.*, No. 07 CV 01444, 2008 WL 6600518, at *2 (C.D. Cal. Jan. 7, 2008) (same); *Barnick v. Wyeth*, 522 F. Supp. 2d 1257, 1265 (C.D. Cal. 2007) (same); *D'Este v. Bayer Corp.*, No. CV 07-3206, 2007 WL 6913682, at *4 (C.D. Cal. Oct. 9, 2007) (same). *But see Harris*, No. 07-cv-03938, slip op. at 5; *Jirak*, 2010 WL 2331098, at *4; *Kuzinski v. Schering Corp.*, 604 F. Supp. 2d 385, 402-03 (D. Conn. 2009), *aff'd*, No. 09-1945-cv, 2010 WL 2669304 (2d Cir. July 6, 2010); *Smith v. Johnson & Johnson*, No. 06-4787, 2008 WL 5427802, at *7 (D.N.J. Dec. 30, 2008), *aff'd on other grounds*, 593 F.3d 280 (2010); *Ruggeri*, 585 F. Supp. 2d at 272; *Amendola*, 558 F. Supp. 2d at 472.

App. 39a. The jurisdiction of the district court was properly invoked pursuant to 28 U.S.C. §§ 1331 and 1367. Respondents seek back pay for overtime allegedly worked by the sales reps. After discovery, NPC moved for summary judgment, claiming that the sales reps were covered by both the outside sales and administrative exemptions. Respondents cross-moved for summary judgment.

Granting summary judgment for NPC, the district court held that both exemptions applied. App. 40a. Finding *Cote* "directly applicable", the court held that sales reps "engaged in many of the same discretionary activities", and thus "meet each of the administrative exemption's requirements". App. 78a-79a. The court rejected the characterization of sales reps as "mere 'robots'", explaining that "employees may exercise discretion and independent judgment even when they carry out their duties within the confines of a highly regulated industry". App. 79a. The district court also held that the outside sales exemption applied because sales reps "make sales in the sense that sales are made in the pharmaceutical industry . . . by obtaining commitments to prescribe NPC drugs from physicians. They are credited with those sales and compensated accordingly by means of incentive payments." App. 62a, 68a-69a.

The Second Circuit reversed. Giving "controlling deference" to an amicus brief filed by DOL, App. 17a, the court rejected the application of both exemptions as a matter of law. With regard to the administrative exemption, the court acknowledged that the reps exercised discretion and independent judgment in performing their job duties,

but deferred to DOL's newly articulated position that the reps are not "*sufficiently* allowed to exercise either discretion or independent judgment in the performance of their primary duties" and that "for the administrative exemption to apply to the [sales reps], the regulations require a showing of a *greater* degree of discretion, and *more* authority to use independent judgment in matters of significance, than NPC allows the Reps". App. 33a, 35a (emphases added). With regard to the outside sales exemption, the Second Circuit again deferred to DOL's reassessment of the exemption, and held that because the sales reps "cannot transfer ownership" of drugs and do not obtain a legally binding commitment from physicians, they do not make "sales", even within the broad meaning of the FLSA. App. 27a-29a. Following its decision, the Second Circuit granted NPC's motion to stay the mandate.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Because the Second Circuit's New Standards Will Become the National Default Rule, Undermining the Congressionally Created Balance Between Exempt and Non-Exempt Employees and Disrupting a Major American Industry

The Second Circuit's erroneous decision warrants, and is ripe for, the Court's review because it will have immediate disruptive effects on American employers and will become the national standard if uncorrected by the Court.

1. Although Congress passed the FLSA to protect American workers from oppressive working

conditions, *see Nicholson*, 105 F.3d at 1363, "its application is not unlimited". *Cleveland v. City of Elmendorf*, 388 F.3d 522, 526 (5th Cir. 2004). Congress designed the white-collar exemptions to exempt from the FLSA well-paid employees working in positions that were difficult to standardize based on hours worked. *See* Final Rule at 22123-24.

In 1940, DOL revised its regulations governing the white-collar exemptions to ensure their broad sweep. *See supra* pp. 5-6. DOL did this to address employers' concerns about the burdens of the FLSA and to ward off legislative threats to exempt white-collar workers altogether. *Id.* As a result, the administrative exemption became "[o]ne of the broadest and most . . . flexible[] exemptions contained in the [FLSA]", 1 Les A. Schneider & J. Larry Stein, *Wage and Hour Law: Compliance and Practice* § 5:24 (2010). DOL's 2004 Final Rule was designed to reaffirm that the white-collar exemptions were to be applied in a straightforward and expansive manner. Final Rule at 22124-27; *see supra* pp. 6-8.

2. The Second Circuit's decision destroys the balance between exempt and non-exempt employees created by Congress and DOL. The court of appeals has added a new, subjective "greater degree of" discretion and "more" independent judgment test to the administrative exemption—a test that is not found in the FLSA or its regulations. It also has rewritten the outside sales exemption to impose a new "transfer of title" requirement that is contrary to the language and purpose of the FLSA. These new tests narrow the exemptions, contrary to Congress's original intent, and create the exact mischief that

Congress and DOL, prior to the filing of its amicus brief, sought to avoid.

These new requirements are not limited to the pharmaceutical industry or to sales reps. On the contrary, the Second Circuit's unprecedented interpretations of the administrative and outside sales exemptions risk a change in the treatment of nearly one-quarter of the American workforce, *see* U.S. General Accounting Office, *Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place*, 2 (1999) (in 1998, 20-27 percent of the full-time workforce in the United States—19 to 26 million workers—was covered by the white-collar exemptions), and subjects employers across all industries to suit by multiple employees seeking back pay and other damages.

The decision also calls into question a number of existing courts of appeals' interpretations of the FLSA in other industries. *See, e.g.*, *Gieg v. DDR, Inc.*, 407 F.3d 1038, 1047-48 (9th Cir. 2005) (definition of sales in the automobile industry); *Renfro v. Mich. Power Co.*, 370 F.3d 512, 517-19 (6th Cir. 2004) (utility construction planners); *Cowart v. Ingalls Shipbldg., Inc.*, 213 F.3d 261, 267 (5th Cir. 2000) (shipbuilding); *Robinson-Smith v. Gov't Emps. Ins. Co.*, 590 F.3d 886, 892-96 (D.C. Cir. 2010) (insurance adjusters); *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 13 (1st Cir. 1997) (insurance salespersons).

3. In particular, the Second Circuit's decision will have an immediate and deleterious effect on the pharmaceutical industry. Potential litigants across the country will flock to courts in the Second Circuit

to take advantage of the new regime there, leaving all pharmaceutical companies virtually defenseless because of the similarities in their sales forces. Precedent and earlier victories outside the Second Circuit, most notably in the Third Circuit, will provide no protection against relitigating the exemptions' applicability under the new rule in the Second Circuit: virtually all of those cases were individual lawsuits or opt-in collective actions in which the trial court granted summary judgment before addressing the propriety of class certification. Because, in this context, "[a] single positive trumps all the negatives", *In re Bridgestone/Firestone Tires Prods. Liab. Litig.*, 333 F.3d 763, 766-67 (7th Cir. 2003) (Easterbrook, J.), all pharmaceutical companies, even those that have prevailed to date in other courts, will soon be faced with massive retroactive liability.[10]

A lasting effect of the Second Circuit's decision will be a fundamental alteration in the way in which the pharmaceutical industry has marketed prescription drugs for decades. Converting sales reps—who are central to the way pharmaceutical companies sell their products—from salaried to

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[10] Nor will the impact of the Second Circuit's decision be limited to newly-filed cases—the decision will have ramifications even in individual cases in other jurisdictions in which pharmaceutical companies have previously prevailed. Indeed, on September 28, 2010, the United States District Court for the Southern District of Texas granted plaintiffs' motion for reconsideration in *Harris*, "adopt[ing] the reasoning of the Second Circuit"—including paying controlling deference to DOL's amicus brief—and reversed its earlier holding that sales reps were exempt under both the administrative and outside sales exemptions. *Harris*, No. 07-cv-03938, slip op. at 5.

hourly workers will necessarily lead to a fundamental change in how these companies operate. By tying compensation to hours worked, rather than sales performance, sales reps will lose their incentive to generate profits for their employer. And as hourly workers, sales reps will also lose the flexibility to spend as much time as they feel appropriate to make a sale, thereby reducing opportunities for increased compensation. *See* Steven Blackburn, *In re Novartis Wage and Hour Litigation, in Top 20 Food and Drug Cases, 2009 & Cases to Watch, 2010*, 159, 168 (John B. Reiss ed., 2010). By stripping the sales rep position of these defining qualities, the decision will also make it difficult for pharmaceutical companies to recruit and retain sales reps who prize flexibility, work requiring self-motivation and initiative and opportunities for incentive compensation—the very people who have been successful in this position. *See id.* at 168-69.

II. The Second Circuit's Interpretation of the Administrative Exemption Is Erroneous and Conflicts with Decisions of the Third and D.C. Circuits and DOL Regulations

The FLSA regulations state that the exercise of discretion and independent judgment "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered". 29 C.F.R. § 541.202(a). An illustrative "non-exclusive" list of factors is used to determine "whether an employee exercises discretion and independent judgment with respect to matters of significance", including, *inter alia*, whether the employee "performs work that affects business

operations to a substantial degree", "has authority to commit the employer in matters that have significant financial impact" and "is involved in planning long- or short-term business objectives". 29 C.F.R. § 541.202(b).

1. The Second Circuit agreed that sales reps evaluate various courses of conduct, make on-the-spot decisions in executing their sales strategies, decide how to allocate their budgets, commit NPC financially by entering into various contracts which may cost NPC thousands of dollars and make judgments about the allocation of samples to physicians—all without direct supervision. App. 32a-35a. Thus, the sales reps met several Section 202(b) factors, which DOL, in the past, has said is enough for the exemption to apply. Final Rule at 22143.

Nonetheless, the court concluded that sales reps are not "*sufficiently* allowed to exercise either discretion or independent judgment in the performance of their primary duties", according controlling deference to DOL's argument that, while sales reps exercised some discretion, "the regulations require a showing of a *greater degree* of discretion and *more* authority to use independent judgment in matters of significance, than [NPC] allows the Reps". App. 33a, 35a (emphases added). Not only was such deference to DOL improper (*see infra* Part IV), but concluding that a "greater degree of" discretion and "more" independent judgment are required to qualify for the exemption is erroneous, flatly contrary to DOL's 2004 Final Rule, *see supra* pp. 6-7, and in conflict with the Third and D.C. Circuits.

2. Though aware of DOL's brief in this case, the Third Circuit in *Smith* concluded that a Johnson & Johnson ("J&J") sales rep was an administrative employee because she "executed nearly all of her duties without direct oversight" and "described herself as the manager of her own business who could run her territory as she saw fit". *Smith*, 593 F.3d at 285. This was so even though she "worked off of a prepared 'message' that J&J provided her" and "J&J gave her pre-approved visual aids and did not permit her to use other aids". *Id.* at 282. In *Baum*, the Third Circuit held that, under a Pennsylvania state law modeled on the FLSA, an AstraZeneca sales rep whose duties were "very similar" to those of the J&J sales rep in *Smith* was covered by the administrative exemption. 2010 WL 1063935, at *9-10. There is no material difference between the job description of NPC's sales reps and the duties and responsibilities of any of the sales reps held exempt in these cases. *See supra* pp. 8-11.

The Second Circuit's decision also conflicts with the D.C. Circuit's application of the liberal standard embodied in DOL's 2004 regulations. In *Robinson-Smith*, the D.C. Circuit reversed a decision which had concluded that although auto damage adjusters exercised "some discretion", the discretion "exercised was not sufficient" to meet the standards of the administrative exemption. 590 F.3d at 890. The D.C. Circuit concluded that while "the parties disagree on how much discretion the adjuster exercises, no one disputes that he exercises 'some'",

and thus the employees were covered by the administrative exemption. *Id.* at 893-95.[11]

3. Although the FLSA's exemptions "are to be narrowly construed against the employers seeking to assert them and their applications limited to those [] plainly and unmistakably within their terms and spirit", *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), this canon does not trump common sense. "To read the FLSA blindly, without appreciation for the social goals Congress sought, would also do violence to the FLSA's spirit." *See Gregory v. First Title of Am., Inc.*, 555 F.3d 1300, 1307 (11th Cir. 2009) (quoting *Nicholson*, 105 F.3d at 1364). When the statutory language and intent of Congress are clear, this canon of construction does not apply. *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 508 (7th Cir. 2007) (*citing A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)); *Mechmet v. Four Seasons Hotel, Ltd.*, 825 F.2d 1173, 1177-78 (7th Cir. 1987) (canon is at best a tie-breaker if regulations or statute do not answer the issue).

The Second Circuit's new rules do "violence to the FLSA's spirit". It is undisputed that NPC's sales reps earn compensation well above the statutory

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[11] DOL and the Second Circuit cite Section 202(e) of the regulations, which deals with employees who follow rote applications of "well-established techniques, procedures or specific standards described in manuals or other sources". 29 C.F.R. § 541.202(e). *Robinson-Smith* and other circuit court decisions have rejected the view that Section 202(e)'s predecessor (29 C.F.R. § 541.207(b) (2004)) barred application of the administrative exemption to employees who exercise only "some" discretion and independent judgment. 590 F.3d at 893-94 (citing cases).

minimum for this exemption and engage in daily work outside the office, free from supervision. They do not track their time, and the nature of their job would make it difficult to monitor any effort to do so. It is also undisputed that the reps' compensation structure rewards them based on their efforts in increasing sales in their territories. Their work directly affects NPC's primary business operation—the sale of pharmaceutical products. They are precisely the type of worker contemplated by the white-collar exemptions. *See Nicholson*, 105 F.3d at 1364.

III. The Second Circuit's Rejection of the Outside Sales Exemption Conflicts with the FLSA and DOL's Own Regulations and Is At Odds with Decisions from Other Circuit Courts

DOL broadly defines an outside sales employee as one whose primary duty is: "(i) making sales within the meaning of section 3(k) of the Act, or (ii) obtaining orders". 29 C.F.R. § 541.500(a). Under Section 3(k) of the statute, "'[s]ale' or 'sell' *includes any* sale, exchange, contract to sell, consignment for sale, shipment for sale, or *other disposition*". 29 U.S.C. § 203(k) (emphases added). This definition of sales applies throughout the FLSA. *See* 29 U.S.C. § 203. The Second Circuit erred in concluding that sales reps do not come within the scope of the exemption.

1. The plain meaning and purpose of the statute clearly supports the application of the outside sales exemption here. The statutory language is expansive. The word "includes" is a term of

enlargement, therefore the definition is illustrative, not all-inclusive. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2287 & n.10 (2010). Moreover, the term "other disposition", the Second Circuit agreed, "is a catch-all that could have an expansive interpretation". App. 26a. The exemption is premised on the idea that the individual nature and quality of an outside salesperson's work, and entitlement to commission-based incentive compensation, does not warrant the protection of overtime wages:

> Such salesman . . . works individually . . . . In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day.

Jewel Tea Co. v. Williams, 118 F.2d 202, 207-08 (10th Cir. 1941). Petitioner's sales reps clearly meet these criteria.

2. The court of appeals' narrow interpretation that sales require a transfer of ownership takes the FDCA's requirement of a physician's prescription for drug sales—intended to protect patients from the use of inappropriate or unsafe drugs[12]—and turns it on

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[12] *See* Krista Hessler Carver, *A Global View of the First Amendment Constraints on FDA*, 63 *Food & Drug L. J.* 151, 211 n.540 (2008) (21 U.S.C. § 353(b)(1) "rel[ies] on physician's

its head to require the reclassification of thousands of employees. This overly technical construction is at odds with the decisions of other circuits, which reject an overly formalistic approach in favor of one that accounts for the economic realities of the industries at issue and the expansive language of the exemption itself. The Ninth and Tenth Circuits have held that leases are sales under the FLSA, even though no transfer of title is involved. *See Gieg*, 407 F.3d at 1047-49; *Brennan v. Dillon*, 483 F.2d 1334, 1337 (10th Cir. 1973). The Eleventh Circuit has held, based on economic realities and the plaintiff's receipt of commissions, that obtaining orders and referring customers to the employer insurance company without consummating the insurance contract is selling under the outside sales exemption. *Gregory*, 555 F.3d at 1303, 1308-10. Here, the sales reps make sales as they are made in the pharmaceutical industry, and they earn incentive compensation tied to sales within their territories, even if they cannot legally transfer title under the governing FDA regulations. *Cf. Medtronic, Inc. v. Benda*, 689 F.2d 645, 648, 653 (7th Cir. 1982), *cert. denied*, 459 U.S. 1106 (1983) (medical device sales reps sold to physicians because physicians were the "real" purchasers).

3. The Second Circuit's and DOL's interpretation of the exemption is inconsistent with the position DOL has taken for almost 70 years. As DOL explained in 2004, outside salesmen are exempt because they have "salaries well above the minimum wage", "above average fringe benefits and better

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supervision to render safe the use of drugs that would otherwise be unsafe").

opportunities for advancement", their jobs are "difficult to standardize to any time frame" and cannot "be easily spread to other workers after 40 hours in a week". Final Rule at 22123. In its 1940 report, DOL also articulated a list of factors to be considered in determining whether an employee qualifies as an "outside salesperson", which include whether the employer advertised the position as a sales job, the "qualifications [set by the employer] for hiring, [the employee's] sales training [and] the method of payment" of the employee. Stein Report at 51-52. Indeed, as recently as February 2010, DOL's Bureau of Labor Statistics specifically classified pharmaceutical sales reps as employees who "*sell* goods" for wholesalers or manufacturers where technical or scientific knowledge is required. U.S. Bureau of Labor Statistics, *Standard Occupational Classification Definitions* 41-4011 (2010) (emphasis added).[13]

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[13] DOL's position is at odds with the Department of Justice's view, in enforcing the off-label marketing provisions of the FDCA, that sales reps "sell" drugs. *See, e.g.*, Dep't of Justice, Press Release, Pharmaceutical Company Cephalon to Pay $425 Million for Off-Label Drug Marketing (Sept. 29, 2008) (company "structured its sales quota and bonuses in such a way that sales representatives could reach their sales goals only if they promoted *and sold* the drugs for off-label uses") (emphasis added).

IV. The Court Should Grant the Petition To Clarify the Application of *Auer* Where an Agency's Position, Advanced Without Notice-and-Comment Procedures, Reinterprets Unambiguous Regulations, Thereby Causing Unfair Surprise

1. The Second Circuit's analysis as to why DOL's newly-minted views were entitled to controlling deference began and ended with its citation to *Auer*. *See* App. 17a. That the court would conclude that an agency's informal expression of its position was entitled to dispositive deference on such a cursory basis—in a case involving significant economic effects and long-standing policies advanced after notice-and-comment rulemaking—demonstrates that this Court's guidance is needed. *Auer* deference certainly has a place in the Court's administrative law jurisprudence. However, it requires appropriate bounds to ensure that the use of amicus briefs does not improperly substitute for rulemaking and other formal agency processes that assure notice to regulated parties, the opportunity for public participation and political accountability. *Auer* cannot be a rubber stamp. This case presents a needed opportunity for the Court to make clear that there are limitations on *Auer* deference and to give guidance as to the application of those limits.

This is an important and recurring issue—important because the views of administrative agencies have a significant impact on American industries, and recurring because of the prevalence of agency interpretations advanced in amicus briefs and through other informal means. Indeed, DOL's amicus brief below stems from a program it

announced in 2004 to intervene in private FLSA litigations expressly because it expected that federal courts will defer to those interpretations. 13 No. 6 *FLSA Emp. Exemption Handbook News*, 16 (June 2008).

2. In *Auer*, an FLSA case involving the interpretation of the salary-basis test for calculating whether employees come within the scope of a white-collar exemption, the Court requested an amicus brief from DOL to address the appropriate scope of that rule. "Because the salary-basis test is a creature of the Secretary's own regulations", the Court reasoned that DOL's interpretation of it "is controlling unless 'plainly erroneous or inconsistent with the regulation'". *Auer*, 519 U.S. at 461. The Court has held that such deference is warranted only when the agency interprets its own ambiguous regulations. *See id.* at 461; *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous.").[14] That DOL's interpretation took the form of an amicus brief, rather than legally binding rulemaking, did not "in the circumstances of [that] case, make it unworthy of deference". *Auer*, 519 U.S. at 462. Critically, the Court determined that DOL's position was reasonable, in part, because it "avoids the imposition of massive and unanticipated overtime liability". *Id.* at 461.

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[14] The Court has also held that an agency's interpretation does not warrant *Auer* deference where the relevant regulations mirror the statutory language and "give[] little or no instruction on a central issue in th[e] case". *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006).

Recently, in *Long Island Care at Home, Ltd. v. Coke*, the Court revisited the scope of deference to informal agency interpretations that could cause such disruption. In *Coke*, DOL had issued conflicting regulations and interpretations concerning the treatment under the FLSA of employees paid by third parties to provide home health care—a large and growing industry in this country. 551 U.S. 158, 162 (2007). The Court deferred to DOL's most recent position adopting one interpretation of two conflicting regulations, but importantly noted that deference to such agency interpretations would be appropriate only "as long as interpretative changes create no unfair surprise". *Id.* at 170. The Court did not give guidance on how to apply this standard, although it noted that the standard was met in that case because DOL announced its latest position in a notice-and-comment rulemaking procedure. *Id.* at 170-171; *see also Christensen*, 529 U.S. at 588 (cautioning that courts should be wary of informal agency interpretations that create "*de facto* a new regulation" by ignoring clear pre-existing regulatory language).

Prior to *Coke*, a leading academic commentator urged the Court to articulate a "fair notice" limitation on *Auer*. *See* Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 *Wm. & Mary L. Rev.* 559, 607-08 (2006); *see also* Thomas L. Casey, III, *Towards Function and Fair Notice*, 2008 *Mich. St. L. Rev.* 725, 737-48 (2008) (concluding that *Coke* adopted a fair notice limitation).[15] Since *Coke*,

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[15] Other academic commentators have gone further and urged the Court to abrogate *Auer* entirely. *See, e.g.*, William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference:*

two circuit courts have discussed the impact of "unfair surprise" on *Auer* deference—with diverse results. *See Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 461-62 (4th Cir. 2007) (no deference for DOL's interpretation of Family Medical Leave Act advanced in an amicus brief because it was inconsistent with preamble accompanying regulations at issue; no discussion of *Coke*); *id.* at 464 (Duncan, J. dissenting) (applying *Coke* and claiming no unfair surprise because agency issued notice, after oral argument in the appeal, that it was considering changing its position); *Boose v. Tri-Cnty. Metro. Trans. Dist. of Or.*, 587 F.3d 997, 1005 n.13 (9th Cir. 2009) (no unfair surprise under *Coke* because agency attempted to change its position through notice and comment rulemaking); *Pub. Citizen v. NRC*, 573 F.3d 916, 923-24 (9th Cir. 2009) (no unfair surprise because agency is merely "elaborating on" interpretations of its regulations). Other circuits have also expressed doubts about the extent of *Auer*'s reach. *See Keys v. Barnhart*, 347 F.3d 990, 993-94 (7th Cir. 2003) (questioning rationale of *Auer*); *Mich. Bell Tel. Co. v. Covad Commc'ns Co.*, 597 F.3d 370, 375 n.6 (6th Cir. 2010) (same).

3. This case presents substantial problems of fair notice and economic disruption. In 1945, DOL

The Supreme Court Treatment of Agency Statutory Interpretations from Chevron *to* Hamdan, 96 *Geo. L. J.* 1083, 1184 (Apr. 2008) (Court should abrogate *Seminole Rock* and its progeny); Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 *Colum. L. Rev.* 1235, 1294 (Oct. 2007) (*Skidmore* deference more appropriate for informal agency interpretations of regulations); Thomas W. Merrill & Kristen E. Hickman, Chevron's *Domain*, 89 *Geo. L. J.* 833, 900 (Apr. 2001) (same).

issued an opinion letter concluding that sales reps were exempt. In the intervening 64 years, the agency never issued a contrary pronouncement, never brought an enforcement action concerning sales reps, and never issued audit findings challenging the industry's treatment of these employees—even after the issue became the subject of litigation in 1982 and the exemptions were revisited and revised in 2003-2004. There is little question that it was an "unfair surprise" upsetting settled expectations when DOL, without notice, intervened here and reversed this history. While it "is possible for an entire industry to be in violation of the Fair Labor Standards Act for a long time without the Labor Department noticing . . . a more plausible hypothesis is that the . . . industry has been left alone because the character of its compensation system" does not violate the FLSA. *Yi*, 480 F.3d at 510-11. Nor can there be doubt that the effect of the Second Circuit's decision on the pharmaceutical industry will be substantial: it will impose massive retroactive liability—the precise opposite effect of the DOL position deferred to in *Auer*—and significantly change the defining characteristics of its sales force. *See supra* Part I.3. Such disruption is a relevant factor in assessing the extent of deference owed to an agency's informal interpretation. *Cf. Singh v. City of New York*, 524 F.3d 361, 369-70 (2d Cir. 2008) (Sotomayor, C.J.) (noting that the "wide-ranging impact" on businesses was a relevant factor in rejecting plaintiffs' proffered interpretation of the Portal-to-Portal Act, where such interpretation would "suddenly impos[e] upon businesses across the country a liability to compensate employees" that no court had imposed in 60 years).

DOL also created unfair surprise by abandoning its positions in the 2004 Final Rule, where it clearly stated that employees came within the scope of the administrative exemption if their work satisfies at least two or three of the factors identified in 29 C.F.R. § 541.202(b), and codified the holdings of federal cases to simplify the application of the exemption. Final Rule at 22142-44. Instead of adhering to those views here, DOL grafted a new, subjective "greater degree of" discretion and "more" independent judgment test onto the administrative exemption that has no basis in the regulations. Similarly, DOL's brief reinterprets the outside sales exemption to impose a specific "consummated transaction" test that is at odds with the regulations. In doing so, DOL ignored the 2004 Final Rule's definitive statement that the outside sales exemption only required that a sale "in some sense" take place. Final Rule at 22162 (reiterating DOL's statements in the 1940 Stein Report). Thus, through the informal means of an amicus brief, DOL has written "de facto a new regulation", *Christensen*, 529 U.S. at 588, that imposes "unfair surprise", *Coke*, 551 U.S. at 159, 170-71, on the regulated community. *See also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (deference inappropriate if alternative reading is compelled by "other indications of the Secretary's intent at the time of the regulation's promulgation") (internal quotations and citation omitted); *Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 737 (3d Cir. 1999) (Alito, C.J.) ("An agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning") (citation omitted).

According *Auer* deference when an agency brief advances a new reading of a critical feature of a major regulatory regime strikes at fundamental principles of fairness. Strong deference to such critical changes is inappropriate absent notice-and-comment procedures. *See KPMG, LLP v. SEC*, 289 F.3d 109, 116-17 (D.C. Cir. 2002) (explaining in *dictum* that the court could not defer to SEC's interpretation of its regulations if doing so would impose a penalty on an individual without fair notice) (citation omitted). As the Seventh Circuit noted in *Doe v. Mutual of Omaha Insurance Co.*, when an agency advances a "radically expansive" and "far-reaching" interpretation of its regulations that threatens a sea change in an entire industry, courts are "justif[ied] . . . in requiring the Department to invite deference by a more deliberative, public, and systematic procedure than the filing of an amicus brief". 179 F.3d 557, 561, 563 (7th Cir. 1999).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

October 4, 2010

Respectfully submitted,

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APPENDIX

Supreme Court, U.S.
FILED

10-460 OCT 4 - 2010

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,
Petitioner

v.

SIMONA M. LOPES, CATHERINE E. WHITE, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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09-0437-cv
In re Novartis
Wage and Hour
Litigation

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

. . . . . .

August Term, 2009

(Argued: February 19, 2010 Decided: July 6, 2010)

Docket No. 09-0437-cv

In re NOVARTIS WAGE AND HOUR LITIGATION

Before: KEARSE and HALL, Circuit Judges, RAKOFF, District Judge*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Paul A. Crotty, Judge, dismissing claims of pharmaceutical company sales representatives for overtime pay under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq., and state law, finding that such representatives fell within exemptions for

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* Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

outside salesmen and for administrative employees exercising discretion and independent judgment. See 593 F.Supp.2d 637 (2009).

Vacated and remanded.

JEREMY HEISLER, New York, New York (David W. Sanford, Katherine M. Kimpel, Sanford, Wittels & Heisler, Washington, D.C., Steven Wittels, Andrew Melzer, Sanford, Wittels & Heisler, New York, New York, on the brief), for Plaintiffs-Appellants.

RICHARD H. SCHNADIG, Chicago, Illinois (Vedder Price, Chicago, Illinois, Jonathan A. Wexler, Vedder Price, New York, New York, on the brief), for Defendant-Appellee.

JENNIFER R. MARION, United States Department of Labor, Washington, D. C. (Carol A. De Deo, Deputy Solicitor for National Operations, William C. Lesser, Deputy Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, United States Department of Labor, Washington, D. C., on the brief), for Amicus Curiae Secretary of Labor in support of Plaintiffs-Appellants.

OUTTEN & GOLDEN, New York, New York (Justin M. Swartz, Rachel Bien, Outten & Golden, New York, New York, Catherine K. Ruckelshaus, National Employment Law Project, New York, New York, George A. Hanson, Bradley T. Wilders, Stueve Siegel Hanson, Kansas City, Missouri, Rebecca M. Hamburg, National Employment Lawyers Association, San Francisco, California, Richard J. (Rex) Burch, Bruckner Burch,

Houston, Texas, of counsel), filed a brief on behalf of Amicus Curiae National Employment Lawyers Association in support of Plaintiffs-Appellants.

PAUL, HASTINGS, JANOFSKY & WALKER, Washington, D.C. (Neal D. Mollen, Paul, Hastings, Janofsky & Walker, Washington, D.C., Robin S. Conrad, Shane B. Kawka, National Chamber Litigation Center, Washington, D.C., of counsel), filed a brief on behalf of Amicus Curiae Chamber of Commerce of the United States of America in support of Defendant-Appellee.

KEARSE, Circuit Judge:

In these consolidated class actions, the plaintiffs, current or former pharmaceutical sales representatives employed by defendant Novartis Pharmaceuticals Corporation ("Novartis"), appeal from a judgment of the United States District Court for the Southern District of New York, Paul A. Crotty, Judge, denying their claims under the Fair Labor Standards Act of 1938 ("FLSA" or the "Act"), 29 U.S.C. § 201 et seq., and state law, for overtime pay with respect to time worked in excess of 40 hours per week. The district court granted Novartis's motion for summary judgment on the ground that plaintiffs are outside salesmen and/or administrative employees who are exempted from the FLSA's overtime pay requirements. On appeal, plaintiffs contend that the district court did not properly apply the exemption standards set out in regulations promulgated under the FLSA by the United States Secretary of Labor (the "Secretary"), see 29 C.F.R. §§ 541.200-541.204, 541.500-541.504. The Secretary, appearing as amicus curiae, endorses that

contention. For the reasons that follow, we agree with plaintiffs and the Secretary; we thus vacate the judgment of the district court.

I. BACKGROUND

Novartis researches, manufactures, markets, and sells pharmaceuticals. The plaintiffs are some 2,500 persons who were employed by Novartis at various times between March 23, 2000, and April 7, 2007, as sales representatives ("Reps") in California or New York, and who are parties to class actions in the United States District Courts for the Central District of California or the Southern District of New York, respectively, along with Reps employed by Novartis in other states during that period who have opted to join these actions. The actions were consolidated in the Southern District of New York by the Judicial Panel on Multidistrict Litigation for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407. Plaintiffs alleged principally that under the FLSA and state law, they were entitled to overtime pay at the rate of one and one-half times their normal compensation for time worked in excess of 40 hours per week. The following facts are not in dispute.

A. Novartis's Use of Pharmaceutical Sales Representatives

To market its pharmaceuticals, Novartis has a team of "brand" managers who, cognizant of limitations imposed by the United States Food and Drug Administration ("FDA") , devise descriptions of the essential features of each Novartis drug. Marketing managers assist in the production of

written promotional materials. Novartis has regional managers who are involved in hiring, firing, and business planning decisions, including working on marketing strategy with the marketing team. Reporting to the regional managers are district managers who supervise the Reps.

Under federal regulations, Novartis is prohibited from selling its prescription drugs directly to patients. Instead, Novartis typically sells its products to wholesalers, which sell them to individual pharmacies. Physicians write prescriptions that permit patients to purchase those products from pharmacies. Novartis employs some 6,000 Reps nationwide and assigns them to make what Novartis characterizes as "sales" calls on physicians.

Reps do not sell the Novartis products to physicians. Although Novartis advertises openings for Reps as sales positions, the Reps' duties do not include "the exchange of good[s] or services, contracting to sell any good or service, consigning for the sale of any good or service, or obtaining orders or contracts for the use of facilities." (Plaintiffs' Rule 56.1 Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment ¶ 107; Defendant Novartis Pharmaceuticals Corporation's Responses to Plaintiffs' Rule 56.1 Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment ¶ 107.) Rather, in visits typically lasting no longer than five minutes, the Reps provide physicians with information about the benefits of particular Novartis pharmaceuticals and encourage the physicians to prescribe those products. Reps give physicians

reprints of clinical studies reporting findings about the Novartis products. Reps also inform doctors as to whether Novartis products are among those for which insurers will pay, resulting in little or no cost to patients. The Reps give the physicians samples of drugs; these samples are not sold, and no money is exchanged. Indeed, selling drug samples is a federal crime. See 21 U.S.C. §§ 353 (c)(1), 333 (b)(1)(B). The goal of the Reps is to get physicians to say they will prescribe Novartis products for their patients.

To enable the Reps to reach that goal, Novartis puts them through a training program for several weeks. The training is extensive, ranging from instruction on the medical benefits of each Novartis drug--and the way in which Reps should present favorable scientific studies--to matters of technique as detailed as how they should hold their pens when showing Novartis's written material to physicians.

In the training program, a Rep is taught how to question physicians to determine why they may be hesitant about prescribing Novartis products and then to offer arguments to overcome their reluctance. Novartis instructs the Reps on four "social styles" that a given individual may have in interacting with others and teaches the Reps how to tailor their presentations to a physician's particular social style. Novartis has also hired consultants to observe its most successful Reps and incorporate their techniques into the training program.

Novartis sets the number of times per trimester a Rep must call on each physician and how often specific drugs should be promoted. For each product in each trimester, Novartis has a principal

marketing message--its "core message"--developed by the Novartis brand managers, which Reps are instructed to convey to physicians on each call. Novartis gives the Reps written promotional materials developed by its brand and marketing managers, including posters, brochures, and laminated cards, to use on sales calls. The Reps do not play any part in formulating the core message or the written materials; nor do they play any part in devising Novartis's advertising. During training, Reps are required to engage in role-playing, using scripts to practice delivering the core message and parrying objections from physicians.

Although the Novartis training material encourages the Reps to tailor their pitches to an individual physician, they are not allowed to deviate from the core message. They are not allowed to use any written materials other than those provided by Novartis. One Rep testified that Reps were expected to act like "robots" because of the limitations on what they could say during sales calls. If a physician asks a Rep a medical question for which Novartis has not prepared an answer, the Rep is required to refer the doctor to Novartis's medical department.

The Reps report to their district managers by telephone at least every week or two, and sometimes report or confer daily. In addition, once or twice a month, the district managers accompany the Reps on their visits to physicians. During these ride-alongs, the managers observe the Reps' meetings and critique their performance. Reps receive negative reviews if they deliver the Novartis core message in a way that violates FDA-imposed limitations or Novartis policies.

As the Reps do not make sales, they are trained to end their meetings with physicians with a "closing" in which they may ask, "Doctor, will you prescribe this product for your patients who suffer from [the appropriate medical conditions]?" They may also ask, "Doctor, do I have your commitment to prescribe it [?]" One Novartis district manager described this type of colloquy as a "persuasive sale" but acknowledged that there was no way to know whether any physician actually followed through on such a commitment. One Rep stated that a physician might answer affirmatively just to get the Rep out the door.

As to physicians who refuse to entertain office visits from Reps, Novartis instructs the Reps to use other techniques to make contact, such as showing up at hospitals early in the morning before medical rounds. Reps also organize meals and other programs for physicians where speakers promote Novartis products. For such programs, Novartis maintains a list of cooperating doctors, from which Reps must book speakers. Reps manage the budgets for these events, but do so within limits set by Novartis managers; Novartis sets a minimum number of such events that it expects each Rep to hold.

Novartis does not know how many prescriptions individual physicians write for its products. It subscribes to several services that provide it with information as to when prescriptions for Novartis products are filled at pharmacies that report such information to the services; this information identifies the prescribing physicians. Because the data are gathered from pharmacies, however, these

reports represent only the number of prescriptions the reporting pharmacies filled, not all the prescriptions actually written. Further, because some 19,000 pharmacies do not report sales to these services, Novartis has data for only about 72% of all filled prescriptions. Novartis extrapolates from the reported sales in order to estimate the sales at non-reporting pharmacies, and it believes those estimates generate a fairly accurate picture of how many prescriptions are being filled at non-reporting pharmacies; however, the latter prescriptions cannot be traced to particular physicians.

Notwithstanding the absence of actual information as to the numbers of prescriptions for Novartis drugs written by particular physicians, the Reps, whose base wages are at least $455 a week, receive up to a quarter of their compensation as bonuses based on their performance with physicians. Given the limits of its ability to monitor physicians' actual prescriptions, Novartis sets goals for the number of prescriptions it hopes to have filled in a particular territory, and it pays a Rep a bonus when the number of filled prescriptions attributable to physicians in the Rep's territory exceeds the goal Novartis has set. Some Novartis Reps earn more than $100,000 a year. In 2005, Novartis Reps' total compensation averaged $91,539.

The FLSA provides that many employees must be paid one and one-half times their regular rate of compensation for time worked in excess of 40 hours a week, see 29 U.S.C. § 207(a)(1), but provides that certain categories of workers are excluded from this requirement, see id. § 213. Novartis Reps are expected to be in the field from 8 a.m. to 5 p.m. on

work days; they eat lunch with physicians or while driving to or from their physician visits; and they attend the mandatory dinner programs, which sometimes prevent them from returning home before 9 or 10 p.m. Notwithstanding a standard week of five such nine-hour days plus the occasional evening work, Novartis does not give its Reps overtime pay. As is the practice throughout the pharmaceuticals industry, Novartis treats its Reps as exempt from the overtime pay requirement in the FLSA, as well as from comparable state-law requirements.

B. The Decision of the District Court

In the consolidated proceedings, Novartis moved for summary judgment dismissing the complaints on the ground that plaintiffs were "outside salesm[e]n" and/or "administrative" employees, 29 U.S.C. § 213(a)(1), and thus exempt from the overtime pay provisions of FLSA and state labor laws. Novartis also argued that those Reps who earned more than $100,000 a year were exempt under 29 C.F.R. § 541.601 (entitled "Highly compensated employees"). Plaintiffs cross-moved for partial summary judgment ruling that they are not in an exempt category.

Ruling that it need not determine whether any Reps were exempt as highly compensated employees, the district court denied plaintiffs' motion and granted Novartis's motion on the ground that the "Reps are not entitled to overtime compensation because they are exempt from coverage as outside salespersons under the FLSA and state laws, and even if they are not outside salespersons, they are administrative employees and are still exempt." In re

Novartis Wage & Hour Litigation, 593 F.Supp.2d 637, 640 (S.D.N.Y. 2009) ("Novartis I").

With respect to the contention that the Reps were exempt as outside sales employees, see 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.500, the district court reasoned that the Reps met the spirit and the letter of that exemption. It stated that excluding Reps from the exemption merely because they may not "'sell'" in a "technical[]" sense, Novartis I, 593 F.Supp.2d at 649 (citing Jewel Tea Co. v. Williams, 118 F.2d 202 (10th Cir. 1941)), would "ignore[] the Act's spirit, purpose, and goals." Novartis I, 593 F.Supp.2d at 648. The court stated that

> Jewel Tea teaches that outside salespersons are exempt from the overtime requirement not because they "sell," as that term is technically defined, but rather because they (1) generate commissions for themselves through their work and (2) work with minimal supervision, making adherence to an hours-based compensation scheme impractical.

Novartis I, 593 F.Supp.2d at 648-49 (emphasis added). The court also found that Reps do make sales for Novartis ("NPC"), stating as follows:

> Legally, Reps cannot sell NPC drugs directly to physicians. . . . Further, physicians have an ethical obligation to prescribe only drugs suitable for their patients' medical needs, meaning that they cannot make a binding commitment to a Rep to prescribe certain NPC products. . . .

> Nevertheless, . . . the physicians called upon by Reps ultimately control the purchase of NPC products by writing prescriptions. . . . [A]bsent a prescription from a doctor, the patient end-users of NPC drugs are not able to obtain those drugs. NPC spends in excess of $500 million annually to have its Reps meet on a frequent and repeat basis with these physicians to seek their commitments to prescribe NPC products. In other words, Reps make sales in the sense that sales are made in the pharmaceutical industry.

Id. at 650 (emphases added).

Rejecting plaintiffs' contention that the Reps do not make sales because sales of pharmaceuticals are made only by manufacturers to wholesale distributors, then by distributors to pharmacies, and finally by pharmacies to patients, the district court stated that

> [t]he Court cannot ignore reality. Distributors are not the end-users of NPC's products. If physicians did not prescribe NPC products, patients would be unable to buy them and distributors would have no incentive to make purchases from NPC. The purchase cycle commences with a prescription from physicians, who are therefore the appropriate target of the Reps' sales efforts. When the physician writes a prescription for the NPC product, then a sale can take place.

Id.

With respect to the exemption for administrative employees, see 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.200, 541.202, the district court concluded that the Reps also fell within that category, stating that they earn in excess of $455 a week, "they engage in work that is directly related to the management or general business operations of NPC and they exercise discretion and independent judgment with respect to matters of significance." Novartis I, 593 F.Supp.2d at 655. The district court concluded that Reps are engaged in work related to the management or general business operations of Novartis because Reps are not engaged in the production of Novartis pharmaceuticals and because the Reps are critical to dissemination of information about Novartis products:

> Reps meet with physicians and provide them with information about NPC drugs in an attempt to persuade the physicians to write prescriptions for those drugs. The Reps' success in obtaining prescriptions is critical to NPC's business. The sizeable incentive payments made to Reps for generating prescriptions, as well as the more than $500 million paid to the 6,000 Reps, buttress[] the conclusion that obtaining prescriptions for its drugs is critical to NPC's success. There is no other rational explanation for the commitment of this level of financial resources to NPC's sales effort.

Id. at 656. The court concluded that Reps exercise "discretion and independent judgment with respect to matters of significance" because

> Reps are expected to use initiative to increase the number of prescriptions written for their drugs--oftentimes, this involves building a good rapport with the physicians and their staffs. Within the confines of the "core messages" created by NPC, Reps must decide how best to present their information and must determine what type of "close" is most appropriate in a given situation. This, of course, depends on how much time the physician will allow the Rep, the physician's patient base and prescribing history, and numerous other factors. Reps set their daily call schedules and are expected to use their entertainment budgets to host informational events for the physicians on their target lists. In carrying out these activities, they are quite clearly attempting to increase prescriptions for their drugs--a matter of considerable significance for NPC.

Id. at 657. The district court was unpersuaded that Novartis's training and expectations rendered Reps "robots" or automatons who did not exercise significant discretion:

> These labels are not facts, but merely arguments designed to avoid the overtime exemptions. They do not begin to answer why or how a robot or an automaton could or should earn an average salary of $91,500 per year. Nor do they explain why NPC would employ 6,000 Reps at a cost in excess of half a billion dollars per year. They are an attempt to avoid the consequences of

> what Reps do every day--arranging to call on physicians and, after assessing how much time is available for the call, choosing the best possible approach to convince the physician to prescribe NPC drugs the next time an appropriate patient opportunity presents itself. NPC pays a good salary and material incentives to encourage this behavior. Reps are given drug samples, printed materials, and core messages. They are dispatched to the offices of physicians in an attempt to convince those physicians to prescribe NPC products. It defies logic to accept that, in such a situation, Reps are expected to do nothing but chant slogans and mouth platitudes. At the bare minimum, Reps must be capable of tailoring their presentation to a given timeframe--deciding how best to convey the "core message" in a manner that will have the desired effect on the physician. Such a decision involves making an independent judgment, free of direct oversight, even if NPC has provided Reps with guidelines for conveying certain information in a certain manner. Thus, while the exact nature of the discretion and independent judgment exercised by Reps may be in dispute, . . . on the present facts, NPC's Reps have discretion and exercise independent judgment.

Id.

Accordingly, having found both the outside salesman and administrative employee exemptions

applicable, the district court granted Novartis's motion for summary judgment dismissing plaintiffs' claims under the FLSA. In addition, finding that the New York overtime pay exemptions were defined and applied in the same manner as those in the FLSA, see Novartis I, 593 F.Supp.2d at 646, and that California law, although differing slightly in the ways it defined the exemption, was "essentially the same as the FLSA and New York law," id. at 647, the court granted summary judgment dismissing plaintiffs' state-law claims.

This appeal followed.

II. DISCUSSION

On appeal, the Reps contend principally that the district court erred in concluding that they are outside sales employees, given that the "[t]he undisputed evidence in this case shows that the Reps do not obtain orders, form contracts, or engage in any type of sale as that term is defined by the FLSA" (Plaintiffs' brief on appeal at 46), and in concluding that Reps are administrative employees given that "[t]hey lack discretion and independent judgment within [the] meaning of the administrative exemption" (id. at 63). Novartis defends the district court's conclusions, arguing that Reps make sales "in the only practical sense applicable to the pharmaceuticals industry" (Novartis brief on appeal at 27), and that, in so doing, the Reps exercise discretion and independent judgment (see id. at 48-55).

The Secretary of Labor, participating in this appeal as an amicus curiae in support of the Reps,

points out that Department of Labor ("DOL" or "Department") regulations promulgated under the FLSA (a) provide, in pertinent part, that an "outside salesman" is one who, inter alia, has the primary duty of "making sales," and (b) provide that an exempt "administrative" employee is one who, inter alia, exercises discretion and independent judgment with respect to matters of significance. The Secretary contends that because the Reps do not make sales or obtain orders and do not exercise discretion and independent judgment, they are not within the "outside salesman" or the "administrative" employee categories that are exempted from the FLSA overtime pay requirements. Novartis argues that the Secretary's interpretations are contrary to the regulations themselves. The United States Chamber of Commerce has filed a brief as amicus curiae in support of Novartis, citing Gonzales v. Oregon, 546 U.S. 243, 257 (2006), and arguing that the Secretary's interpretations are not entitled to deference, on the theory that the regulations merely parrot the FLSA's language and that the Secretary is thus interpreting only the words of Congress, not those of the regulations.

For the reasons that follow, we conclude that the Secretary's regulations define and delimit the terms used in the statute; that under those regulations as interpreted by the Secretary, the Reps are not outside salesmen or administrative employees; and that the Secretary's interpretations are entitled to "controlling" deference, Auer v. Robbins, 519 U.S. 452, 461 (1997) .

A. The FLSA's Overtime Pay Requirement

Congress enacted the FLSA in 1938 to combat "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." FLSA § 2 (a), 29 U.S.C. § 202 (a). Section 7(a)(1) of the FLSA provides, in pertinent part, that

> no employer shall employ any of his employees who in any workweek . . . is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1) (emphases added). To the extent pertinent to this appeal, FLSA § 13(a)(1) exempts from that overtime pay requirement

> any employee employed in a bona fide . . . administrative . . . capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary[)].

29 U.S.C. § 213(a)(1) (emphases added). The FLSA definitions section provides that

> "[s]ale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

FLSA § 3(k), 29 U.S.C. § 203(k).

"The overtime requirements of the FLSA were meant to apply financial pressure to 'spread employment to avoid the extra wage' and to assure workers 'additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act.'" Davis v. J.P. Morgan Chase & Co., 587 F.3d 529, 535 (2d Cir. 2009) (quoting Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 578 (1942), superseded by statute, Portal-to-Portal Pay Act of 1947, ch. 52, 61 Stat. 84). Because the FLSA is a "remedial law," Reiseck v. Universal Communications of Miami, Inc., 591 F.3d 101, 104 (2d Cir. 2010), exemptions to the overtime pay requirement are "'narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.'" Bilyou v. Dutchess Beer Distributors, Inc., 300 F. 3d 217, 222 (2d Cir. 2002) (quoting Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)). The burden of proving that employees fall within such an exemption is on the employer. See, e.g., Bilyou v. Dutchess Beer Distributors, Inc., 300 F.3d at 222.

We review de novo a district court's grant or denial of summary judgment, viewing the record in the light most favorable to the party against whom summary judgment is sought. See, e.g., Dillon v. Morano, 497 F.3d 247, 251 (2d Cir. 2007). Whether the duties of a job qualify an employee for a FLSA exemption is a question of law, which we review de novo. See, e.g., Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986); Zheng v. Liberty Apparel Co., 355 F.3d 61, 76 (2d Cir. 2003).

B. The "Outside Salesman" Exemption

Pursuant to her statutory mandate to "define[] and delimit[]" the terms "outside salesman" and "administrative" employee, 29 U.S.C. § 213(a)(1), the Secretary has promulgated several regulations. Regulations issued in 2004 provide, inter alia, that "[a] job title alone is insufficient to establish the exempt status of an employee," 29 C.F.R. § 541.2; rather, that status may be determined only on the basis of the employee's "salary and duties," id. With respect to "outside salesman," the regulations provide as follows:

> (a) The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:
>
> (1) Whose primary duty is:
>
> (i) making sales within the meaning of section 3(k) of the Act, or
>
> (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.
>
> (b) . . . . In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction

> with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

Id. § 541.500 (emphases added). Elaborating on the meaning of sales of commodities, as contrasted with sales of services or the use of facilities, the regulations provide that

> [s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3 (k) of the Act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

29 C.F.R. § 541.501 (b) (emphasis added).

The regulations go on to describe the circumstances in which an employee's efforts to "promot[e]" a product constitute--or do not constitute—"sales" within the meaning of the regulations:

> (a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside

> sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. . . .
>
> (b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such an employee can be considered an exempt outside sales employee if the employee's primary duty is making sales or contracts. Promotional activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.

Id. §§ 541.503 (a)-(b) (emphases added).

As described in the preamble to the 2004 DOL regulations, these rules had their origins in regulations adopted after DOL hearings conducted in the 1940s (resulting in a 1940 "Stein Report" and a 1949 "Weiss Report"), see Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22124 (Apr. 23,

2004) ("2004 Final Rule" or "Final Rule"). The Final Rule's preamble ("Preamble") discussed whether an outside employee's promotional activities qualify him as a "salesman" and emphasized that no one could be considered a salesman within these regulations unless he in some sense made a sale.

Addressing concerns expressed by such groups as the Grocery Manufacturers Association, the National Association of Manufacturers, and the U.S. Chamber of Commerce for the emphasis on an employee's "own" sales, given the technological advances that enable a customer to place its own order directly with a supplier, the DOL agreed that a determination of whether an employee is exempt as an outside salesman "should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button." 2004 Final Rule at 22163. But while the Preamble stated that the DOL "agree[d] that technological changes in how orders are taken and processed should not preclude the [outside salesman] exemption for employees who in some sense make the sales," id. at 22162, it emphasized that

> the Department does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services. An employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales. See 1940 Stein Report at 46 (outside sales exemption does

> not apply to an employee "who does not in some sense make a sale") (emphasis added). Extending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test.

2004 Final Rule at 22162 (first two emphases ours). The Preamble also elaborated on the primary-duty standard:

> Employees have a primary duty of making sales if they "obtain a commitment to buy" from the customer and are credited with the sale. See 1949 Weiss Report at 83 ("In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt").

2004 Final Rule at 22162-22163 (emphases ours).

We note that the distinction between obtaining commitments to buy and promoting sales by other persons has been respected in areas other than the pharmaceutical industry. See, e.g., Gregory v. First Title of America, Inc., 555 F.3d 1300, 1309 (11th Cir. 2009) (employee who obtained commitments to buy her employer's title insurance service and was credited with those sales, and all of whose efforts

were directed towards the consummation of her own sales and not towards stimulating sales for the employer in general, was an outside sales employee within the meaning of the FLSA and the regulations); Clements v. Serco, Inc., 530 F.3d 1224, 1228 (10th Cir. 2008) (civilian military recruiters who did not obtain commitments from recruits were not outside salesmen within the meaning of, e.g., 29 C.F.R. § 541.504); Wirtz v. Keystone Readers Service, Inc., 418 F.2d 249, 253, 260 (5th Cir. 1969) ("student salesmen" were not outside sales employees where their promotional activities were incidental to sales made by others) .

We think it clear that the above regulations, defining the term "sale" as involving a transfer of title, and defining and delimiting the term "outside salesman" in connection with an employee's efforts to promote the employer's products, do far more than merely parrot the language of the FLSA. The Secretary's interpretations of her regulations are thus entitled to "controlling" deference unless those interpretations are "'plainly erroneous or inconsistent with the regulation." Auer, 519 U.S. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (other internal quotation marks omitted)).

We find no such inconsistency and see no such error. Although Novartis contends that the position taken by the Secretary as amicus on this appeal is contrary to the regulations, we disagree. The basic premise of the regulations explaining who may properly be considered an exempt "outside salesman" --a term for which the FLSA explicitly relies on the Secretary to promulgate defining and delimiting

regulations--is that an employee is not an outside salesman unless he does "in some sense make the sales," 2004 Final Rule at 22162. And although that phrase (on which Novartis relies heavily (see, e.g., Novartis brief on appeal at 12, 22, 25, 29)) does not appear in any of the regulations that explicate the term "outside salesman," the regulations quoted above make it clear that a person who merely promotes a product that will be sold by another person does not, in any sense intended by the regulations, make the sale. The position taken by the Secretary on this appeal is that when an employee promotes to a physician a pharmaceutical that may thereafter be purchased by a patient from a pharmacy if the physician--who cannot lawfully give a binding commitment to do so--prescribes it, the employee does not in any sense make the sale. Thus, the interpretation of the regulations given by the Secretary in her position as amicus on this appeal is entirely consistent with the regulations.

Nor can we conclude that the regulations constitute an erroneous interpretation of the FLSA definition of "sale" to "include[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition," 29 U.S.C. § 203(k). Although the phrase "other disposition" is a catch-all that could have an expansive connotation, we see no error in the regulations' requirement that any such "other disposition" be "in some sense a sale." Such an ejusdem generis-type interpretation is consistent with the interpretive canon that exemptions to remedial statutes such as the FLSA are to be read narrowly, see Arnold, 361 U.S. at 392; see generally A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493

(1945), and is neither erroneous nor unreasonable, see, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) We accordingly owe the Secretary's interpretation deference, and we turn to the question of its applicability to the present cases.

There is no genuine dispute over the sales path generally traversed by Novartis pharmaceuticals. As described in Part I.A. above, Novartis sells its drugs to wholesalers; the wholesalers then sell them to pharmacies; and the pharmacies ultimately sell the drugs to patients who have prescriptions for them. The Reps promote the drugs to the physicians; the Reps do not speak to the wholesalers or to the pharmacies or to the patients.

Nor is there any dispute as to what occurs during the Reps' "sales" calls on physicians. The meetings are brief--generally less than five minutes--and the physicians neither buy pharmaceuticals from the Reps nor commit to buying anything from the Reps or from Novartis. The Reps may give physicians free samples, but the Reps cannot transfer ownership of any quantity of the drug in exchange for anything of value. The physician is of course an essential step in the path that leads to the ultimate sale of a Novartis product to an end user; a patient cannot purchase the product from a pharmacy without a prescription, and it is the physician who must be persuaded that a particular Novartis drug may appropriately be prescribed for a particular patient. But it is reasonable to view what occurs between the physicians and the Reps as less than a "sale."

Novartis suggests that "sale" should be read broadly in light of the statement in the Preamble that "'[e]mployees have a primary duty of making sales if they "obtain a commitment to buy" from the customer and are credited with the sale.'" (Novartis brief on appeal at 23 (quoting 2004 Final Rule at 22162) (emphases in brief).) It argues that the Reps "make sales in some sense" because "they are responsible for eliciting commitments from the physicians on whom they call to write prescriptions for NPC drugs and that these prescriptions are, in essence, orders for NPC drugs to be used by the patients in purchasing the drugs from pharmacies." (Novartis brief on appeal at 25-26 (emphasis in original) (internal quotation marks omitted).) Novartis's emphatic reliance on the word "commitments," however, does not lead to a conclusion that the Reps make sales, for it ignores the nature of the "commitment" expressly envisioned by the Secretary in enacting the regulations: "a commitment to buy," 2004 Final Rule at 22162, 22163 (emphasis added). The type of "commitment" the Reps seek and sometimes receive from physicians is not a commitment "to buy" and is not even a binding commitment to prescribe. As the district court noted, "physicians have an ethical obligation to prescribe only drugs suitable for their patients' medical needs, meaning that they cannot make a binding commitment to a Rep to prescribe" a particular Novartis product. Novartis I, 593 F.Supp.2d at 650 (emphasis added). Thus, although physicians may say that they will prescribe a given Novartis drug for patients with appropriate diagnoses, such an assurance is not a binding commitment, and physicians remain entirely free to

prescribe a competing product made by a company other than Novartis.

In sum, where the employee promotes a pharmaceutical product to a physician but can transfer to the physician nothing more than free samples and cannot lawfully transfer ownership of any quantity of the drug in exchange for anything of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it, we conclude that it is not plainly erroneous to conclude that the employee has not in any sense, within the meaning of the statute or the regulations, made a sale.

Novartis points out that a number of district courts have held that pharmaceutical sales representatives are exempt from the FLSA overtime pay requirements as outside salesmen (and/or administrative employees). Those cases are, of course, not binding on us, and their reasoning does not persuade us that the Secretary's interpretations of the regulations should be disregarded. To the extent that the pharmaceuticals industry wishes to have the concept of "sales" expanded to include the promotional activities at issue here, it should direct its efforts to Congress, not the courts. Given the existing statute and regulations, we conclude that the district court should have ruled that the Reps are not outside salesmen within the meaning of the FLSA and the regulations.

C. The "Administrative" Employee Exemption

The Secretary's regulations interpreting the FLSA exemption for "any employee employed in a

bona fide . . . administrative . . . capacity," 29 U.S.C. § 213(a)(1), establish three criteria that must be met for an employee to fit within that category. To be such an "administrative" employee, (1) the employee must earn at least $455 a week, (2) his "primary duty" must be "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers," and (3) his "primary duty" must "include[] the exercise of discretion and independent judgment with respect to matters of significance," 29 C.F.R. § 541.200(a); see, e.g., id. § 541.201 (elaborating on the second criterion); id. § 541.202 (elaborating on the third criterion). For purposes of this appeal, the relevant issue is whether Novartis has adduced sufficient evidence to permit a rational juror to infer that the Reps meet the third criterion.

With respect to the requirement that the employee's primary duty include "the exercise of discretion and independent judgment with respect to matters of significance," the regulations provide, in relevant part, as follows:

> In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

(b) The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the

> company in handling complaints, arbitrating disputes or resolving grievances.
>
> . . . .
>
> (e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. . . .

Id. § 541.202(a), (b), and (e).

On appeal, the Reps contend that they do "low-level, discretionless marketing work, strictly controlled by Novartis," and that their duties and authority do not satisfy the requirements for applicability of the administrative employee exemption. (Plaintiffs' brief on appeal at 40.) Novartis, in contending that the Reps exercise discretion and independent judgment, argues that the Reps, for example, "must determine how best to develop a rapport with a physician and develop strategies to engage physicians in an interactive dialogue to draw out their patient concerns, treatment styles and predilections"; must "be able to react to expressed physician concerns by emphasizing particular clinical findings regarding the efficacy and safety of NPC's drugs for specific patient types"; "must determine when and how to deliver the [Novartis-determined core] message, taking into consideration," e.g., "the prior call history with each physician, the physician's time constraints, expressed concerns, prescription-writing tendencies and patient population"; and must "determine how best to close each call by evaluating

whether sufficient groundwork has been laid to seek the physician's commitment on that call to write prescriptions." (Novartis brief on appeal at 50-51.)

The Secretary points out that the regulations make clear that the requirement for authority to "exercise . . . discretion and independent judgment" means more than simply the need to use skill in applying well-established techniques or procedures prescribed by the employer, see 29 C.F.R. § 541.202 (e). The Secretary takes the position that for the administrative exemption to apply to the Reps, the regulations require a showing of a greater degree of discretion, and more authority to use independent judgment in matters of significance, than Novartis allows the Reps. Again we find it appropriate to defer to the Secretary's interpretation.

Comparing the record as to the Reps' primary duties against the illustrative factors set out in § 541.202 (b), for example, we see no evidence in the record that the Reps have any authority to formulate, affect, interpret, or implement Novartis's management policies or its operating practices, or that they are involved in planning Novartis's long-term or short-term business objectives, or that they carry out major assignments in conducting the operations of Novartis's business, or that they have any authority to commit Novartis in matters that have significant financial impact. Although Novartis argues that the Reps do commit Novartis financially when they enter into contracts with hotels, restaurants, and other venues for promotional events, "which may cost NPC thousands of dollars" (Novartis brief on appeal at 3-4), the record reveals that the Reps have been given budgets for such

events by the Novartis managers and that the Reps have no discretion to exceed those budgets. Nor have we been pointed to any evidence that the Reps have authority to negotiate and bind Novartis on any significant matters, or have authority to waive or deviate from Novartis's established policies and procedures without its prior approval. What Novartis characterizes as the Reps' exercise of discretion and independent judgment--ability to answer questions about the product, ability to develop a rapport with a physician who has a certain social style, ability to remember past conversations with a given physician, ability to recognize when a message has been persuasive--are skills gained and/or honed in their Novartis training sessions. As described in Part I.A. above, these skills are exercised within severe limits imposed by Novartis. Thus, it is undisputed that the Reps, inter alia,

- have no role in planning Novartis's marketing strategy;

- have no role in formulating the "core messages" they deliver to physicians;

- are required to visit a given physician a certain number of times per trimester as established by Novartis;

- are required to promote a given drug a certain number of times per trimester as established by Novartis;

- are required to hold at least the number of promotional events ordered by Novartis;

- are not allowed to deviate from the promotional "core messages";

- and are forbidden to answer any question for which they have not been scripted.

Novartis argues that the Reps exercise a great deal of discretion because they are free to decide in what order to visit physicians' offices, free to decide how best to gain access to those offices, free to decide how to allocate their Novartis budgets for promotional events, and free to determine how to allocate their samples. (See Novartis brief on appeal at 51.) In light of the above controls to which Novartis subjects the Reps, we agree with the Secretary that the four freedoms advanced by Novartis do not show that the Reps are sufficiently allowed to exercise either discretion or independent judgment in the performance of their primary duties. Accordingly, we conclude that the district court should have ruled that the Reps are not bona fide administrative employees within the meaning of the FLSA and the regulations.

State Law

The district court concluded that the overtime wage requirements of New York law and California law are not meaningfully different from the requirements of the FLSA, see Novartis I, 593 F. Supp. 2d at 654, 658, and no party has argued on this appeal that the requirements differ. Accordingly, we also vacate the district court's rulings that the Reps fall within the exemptions provided by state law.

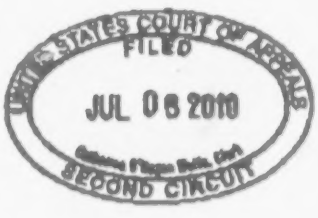
CONCLUSION

We have considered all of Novartis's arguments in support of the judgment and have found in them no merit. We vacate the judgment of the district court and remand for further proceedings not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 6th day of July, two thousand and ten.

BEFORE: AMALYA L. KEARSE,
PETER W. HALL,
Circuit Judges,
JED S. RAKOFF,
District Judge.*



In Re NOVARTIS WAGE AND HOUR LITIGATION

JUDGMENT
Docket No.
09-0437-cv

The appeal in the above-captioned case from the United States District Court for the Southern District of New York was argued on the District Court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is VACATED and the case is REMANDED for further

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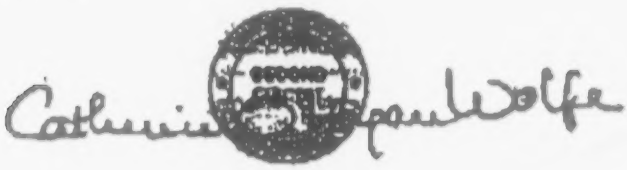
* The Honorable Jed S. Rakoff of the United States District Court for the Southern District of New York, sitting by designation.

proceedings in accordance with the opinion of this Court.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk



Joy Fallek, Administrative Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re Novartis Wage and Hour Litigation	06-MD-1794 (PAC) OPINION & ORDER

HONORABLE PAUL A. CROTTY, United States District Judge:

This consolidated class action lawsuit[1] raises the question of whether individuals employed as Pharmaceutical Sales Representatives ("Reps") are entitled to overtime pay under the federal Fair Labor Standards Act (the "FLSA" or "Act"), 29 U.S.C. §§ 201 et seq., and corresponding state wage and hour laws. Plaintiffs in this action are current and former Reps employed by Defendant Novartis Pharmaceuticals Corporation ("NPC") in New York, California, and other states.[2] They claim they qualify

[1] The present action consolidates two cases. Lopes v. Novartis Corporation et al., No. 06-Civ.-2268, was filed in this District on March 23, 2006. On October 31, 2006, the Judicial Panel on Multidistrict Litigation transferred the second case, White v. Novartis Pharmaceutical Corporation, No. 06-Civ.-11475, from the Central District of California and consolidated it with Lopes for the purpose of pre-trial proceedings.

[2] The Plaintiff class is subdivided into three groups: (1) employees who worked as Reps outside of New York and California between March 23, 2003 and April 7, 2007 and submitted a consent-to-join form; (2) employees who worked as Reps in California between March 23, 2002 and April 7, 2007

for overtime pay, and seek unpaid overtime wages, under the FLSA, as well as under the corresponding laws of New York and California.

NPC contends that Plaintiffs are not entitled to overtime pay because they fall within the "outside sales" and "administrative" exemptions to both the federal and state overtime requirements. NPC also argues that certain members of the Plaintiff class are exempt from the FLSA's overtime requirement because they qualify as "highly compensated" employees.

Both parties have moved for summary judgment, and both claim there are no genuine issues of material fact. Having reviewed the extensive record and heard oral argument from the parties, the Court agrees there are no factual issues, and that judgment as a matter of law is appropriate. Plaintiff Reps are not entitled to overtime compensation because they are exempt from coverage as outside salespersons under the FLSA and state laws, and even if they are not outside salespersons, they are administrative employees and are still exempt. NPC's motion for summary judgment is therefore GRANTED and Plaintiff's motion for summary judgment is DENIED.

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and did not opt out of the class; and (3) employees who worked as Reps in New York between March 23, 2000 and April 7, 2007 and did not opt out of the class. (See Order Certifying Fair Labor Standards Act Collective Action, Rule 23 Class Actions and Approving Notice (Docket #19, Feb. 15, 2007).)

BACKGROUND

I. Facts

Although the parties draw different legal conclusions from the factual record, the material facts themselves are straightforward and essentially undisputed.[3] NPC researches, develops, manufactures, markets, and sells pharmaceutical drugs. It is one of the largest drug manufacturers in the United States, with approximately 13,000 employees nationwide.

More than 6,000 of these employees are Pharmaceutical Sales Representatives. In 2005, Reps earned an average salary of $91,500—meaning that, for the year, NPC spent a total of roughly half a billion dollars on Reps' salaries. Some Reps earn in excess of $100,000 per year. NPC advertises its Rep positions as sales positions, and seeks to fill them with college graduates who are self-motivated, can work independently, and demonstrate good communication and interpersonal skills. When hired, Reps are told that they are a part of NPC's sales force and that they will be engaged in selling NPC products. Because new Reps often lack pharmaceutical backgrounds, NPC provides them with basic training in anatomy, physiology, pharmacology, and other subjects. New Reps are also trained in sales techniques before being sent out into

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[3] The facts presented herein are derived from the parties' motions for summary judgment; their statements of fact submitted pursuant to Local Rule 56.1; and the transcript of the oral argument before this Court on November 18, 2008.

the field. NPC supplements this initial training with continuing education sessions during the course of the Reps' employment.

The primary function of the Reps is calling on physicians and giving them information about NPC's drugs. Each Rep is assigned to a geographic territory and provided with a target list of physicians. Reps are further divided into three categories: "Mass Market" Reps call on general practice physicians; "Specialty" Reps call on specialists such as cardiologists or neurologists; and "Hospital" Reps call on major medical centers and teaching hospital personnel. Reps are assigned certain NPC drugs depending upon the type of physicians on their target list—for example, a Specialty Rep responsible for visiting a number of cardiologists would be assigned NPC drugs that are appropriate for a cardiologist to prescribe. Indeed, the goal of the Reps' visits is to educate the physicians about NPC drugs so that the physicians may write prescriptions for those drugs where doing so would be appropriate for the physicians' patients.

Since the Reps are advocating products which are routinely and closely regulated by the Food and Drug Administration (FDA), NPC prepares scripts and related materials which the Reps are expected to use to deliver a "core message" about NPC products to each physician they visit. Reps may not go beyond the boundaries of the messages crafted by NPC. For example, Reps may not make claims about the effectiveness of NPC's products, nor can they comment adversely on a competitor's product, unless these claims have been cleared by NPC. NPC also controls the methods by which Reps may convey

their message. NPC provides Reps with drug samples, pamphlets, clinical studies, visual aids, and other materials, and gives instructions on how these materials should be used during the Reps' presentations.

While NPC provides Reps with core messages and supporting materials, Reps have discretion as to when and how they deploy them. Reps plan their daily call schedules and decide when to visit each doctor on their target list. Within the parameters set by NPC, Reps are expected to tailor their presentations to each individual physician based upon such variables as the amount of time the physician allocates to meeting with the Rep; the physician's patient base and prescribing habits; and the Rep's assessment of the physician's personality. In addition, NPC provides Reps with budgets that they are expected to use to organize "lunch-and-learn" presentations and other informational events for the physicians on their list. Reps select the speakers and invitees for these informational events following guidelines set by NPC.

Under applicable FDA regulations, Reps are barred from selling NPC drugs directly to physicians. Instead, Reps focus on persuading physicians to write prescriptions that are ultimately used by patients in order to obtain NPC products from a pharmacy. Reps are expected to end each physician visit with a "close." Ideally, a Rep closes a visit by asking the physician for a non-binding commitment to prescribe NPC drugs where doing so is appropriate for a patient. At other times, a Rep might close by asking the physician to review a clinical study supporting the use of an NPC product

or even simply thanking the physician for his or her time.

In addition to base pay, Reps receive "incentive payments." These incentive payments are tied to the number of prescriptions written by physicians within the Reps' territory for drugs to which the Reps is assigned. Plaintiffs concede that between 15% and 25% of a Rep's average annual salary of $91,500 consists of incentive pay. Payments of between $13,725 and $22,875 are significant components of a Rep's annual salary. Additionally, NPC provides Reps with company cars and fuel costs to facilitate their physician visits. High-performing Reps are eligible for additional benefits such as all-expenses-paid vacations.

Reps do not work out of NPC's offices. They work from their homes, and spend most of their day traveling, in their company-provided vehicles, from physician to physician. Once every four to six weeks, their managers accompany them on their calls in what is known as a "ride-along." Aside from these ride-alongs, Reps are generally on their own, subject to such supervision as can be gained by cell phone and e-mail communications with supervisors. Although NPC expects Reps to be in the field making calls from 8 a.m. to 5 p.m. each weekday, and expects Reps to call on a certain number of physicians each day, Reps are ultimately responsible for organizing their daily activities.

At all times relevant to the present action, NPC classified its Reps as exempt from the FLSA's overtime requirement. Plaintiffs have no complaint about their salary, which is well in excess of the

statutory minimum. Instead, Plaintiffs contend they should be compensated at time-and-a-half for hours worked in excess of 40 hours per week.

II. The Fair Labor Standards Act (FLSA) and Corresponding State Laws

A. The FLSA

The FLSA was enacted 70 years ago, in 1938, to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). To that end, the FLSA imposes various wage and hour requirements, including the overtime requirement at issue in the present case. Section 207(a)(1) of the Act provides that "no employer shall employ any of his employees...for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." Id. § 207(a)(1).

Section 213(a)(1) establishes the so-called "white collar" exemptions to the overtime requirement, including the outside sales and administrative exemptions. See id. § 213(a)(1). In 2004, the Department of Labor ("DOL")[4] explained the rationale behind these exemptions:

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[4] The FLSA grants the Secretary of Labor broad authority to "define[] and delimit[]" the exemptions to the overtime requirement "from time to time by regulations." 29 U.S.C. §

> The legislative history [of the FLSA] indicates that the section 13(a)(1) exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay. Further, the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium.

Dep't of Labor, Wage and Hour Division, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule ("DOL 2004 Final Rule"), 69 Fed. Reg. 22122, 22123-24 (Apr. 23, 2004).

213(a)(1). The DOL's regulations therefore "have the force of law...and are to be given controlling weight unless they are found to be arbitrary, capricious, or manifestly contrary to the statute." Freeman v. Nat'l Broad. Co., Inc., 80 F.3d 78, 82 (2d Cir. 1996). The DOL also issues interpretive regulations setting forth the Secretary's official position on how the regulations should be applied. These interpretations do not have the force of law, but they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

Due to the remedial nature of the FLSA's overtime requirement, however, exemptions should be "narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." Bilyou v. Dutchess Beer Distribs., Inc., 300 F.3d 217, 222 (2d Cir. 2002) (quoting Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)). An employer who invokes an exemption bears the burden of proving that its employees are exempt. See Bilyou, 300 F.3d at 222.

1. The Outside Sales Exemption

FLSA section 213(a)(1) exempts from overtime compensation "any employee employed...in the capacity of outside salesman." 29 U.S.C. § 213(a)(1). An outside salesperson is defined as any employee:

> (1) Whose primary duty is:
>
> > (i) making sales within the meaning of Section 3(k) of the Act; or
> >
> > (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

29 C.F.R. § 541.500(a).

The terms "sale" and "sell" include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). The DOL has further indicated that "[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." 29 C.F.R. § 541.501(b). In the 1940 "Stein Report," the DOL stated that it would be improper to extend the outside sales exemption to "anyone who does not in some sense make a sale." Dep't of Labor, Wage and Hour and Public Contracts Divisions, Report and Recommendations of the Presiding Officer (Harold Stein) on Proposed Revisions of Regulations (Oct. 10, 1940) ("Stein Report") at 46; see also DOL 2004 Final Rule, 69 Fed. Reg. at 22162 ("An employer cannot [apply the outside sales exemption] unless it demonstrates that the employee, in some sense, has made sales.").

An employee's primary duty is "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). A determination of an employee's primary duty "must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." Id. For the purposes of determining whether an employee falls within the outside sales exemption, all work that is "performed incidental to and in conjunction with the employee's own outside sales or solicitations" or "that furthers the employee's sales efforts" must be counted as exempt outside sales work. Id. § 541.500(b). In other words, once it has been determined that an employee makes sales, all work done by that employee incidental to those

sales must be taken into account when determining whether sales work constitutes the employee's primary duty.

The DOL's regulations draw a distinction between exempt and non-exempt promotional work. "Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work." Id. § 541.503(a). The DOL gives an example of promotional work incidental to sales made by others: a manufacturer's representative who visits a customer's shop for the purposes of "putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise." Id. § 541.503(b). Further, in a 1999 Opinion Letter, the DOL determined that college recruitment counselors were not exempt outside salespersons because they were "not engaged in making sales of the college's services, or obtaining contracts for its services." Opinion Letter No. 2138 [1999-02 Wages-Hours] Lab. L. Rep. (CCH) ¶ 33030 (Apr. 20, 1999). Instead, the counselors engaged in non-exempt promotional work by "identifying qualified customers, i.e. students, and inducing their application to the college, which in turn decides whether to make a contractual offer of its educational services to the applicant." Id.

2. The Administrative Exemption

The FLSA also exempts "any employee employed in a bona fide...administrative ...capacity" from the

overtime requirement. 29 U.S.C. § 213(a)(1). The DOL defines an administrative employee as one who earns more than $455 per week and whose primary duties include: (1) "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers" and (2) "the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a). Application of the administrative exemption therefore involves a "two-part inquiry" which takes into account both the "type of work" the employee performs and the "level or nature" of that work. DOL 2004 Final Rule, 69 Fed. Reg. at 22144.

a. Office or non-manual work directly related to management or general business operations

In order to meet the first requirement, "an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a). Administrative work is therefore distinct from production work, although the DOL has cautioned that the administrative/production distinction is but "one analytical tool" for determining whether the exemption applies, and that it is only outcome determinative where the employee's work "falls squarely on the production side of the line." DOL 2004 Final Rule, 69 Fed. Reg. at 22141.

Exempt administrative work includes "advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control. Much of this work, but not all, will relate directly to management policies." Id. at 22138. The administrative exemption also covers "a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business." Id. The DOL has stated that work related directly to management or general business operations:

> includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

29 C.F.R. § 541.201(b).

b. Discretion and independent judgment with respect to matters of significance

The DOL defines "the exercise of discretion and independent judgment" as "the comparison and the

evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed." Id. § 541.202(a). In determining whether an employee meets this requirement, the DOL has provided an extensive, though not exhaustive, list of "[f]actors to consider":

> whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to the operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

Id. § 541.202(b). "Federal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment...." DOL 2004 Final Rule, 69 Fed. Reg. at 22143.

The DOL has cautioned that the mere "use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources" falls short of discretion and independent judgment. 29 C.F.R. § 541.202(e). Instead, an employee must "ha[ve] the authority to make an independent choice, free from immediate direction or supervision" in order to be exempt. Id. § 541.202(c). The employee need not, however, be the final decision-maker. To the contrary, "[t]he fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment." Id. § 541.202(c).

Depending upon the nature of the employer's business, a large number of employees may satisfy the second requirement of the administrative exemption. "The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance." Id. § 541.202(d).

3. The Highly Compensated Employee Exemption

In August 2004, the DOL created an exemption to the overtime requirement for highly compensated employees, defined as employees who: (1) receive total annual compensation of at least $100,000 (including commissions and other non-discretionary compensation) and a weekly salary of at least $455 per week, and (2) "customarily and regularly perform[] any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee." Id. § 541.601(a)-(b)(1). Employees "customarily and regularly" perform a duty if they perform it more than occasionally but less than constantly. Id. § 541.701. In other words, employees who earn at least $100,000 are exempt from the FLSA's overtime requirement if they perform at least one exempt administrative duty with some degree of regularity.

B. New York and California Overtime Laws

Under New York law, as under the FLSA, employees are entitled to overtime pay for every hour they work beyond 40 in a week. New York law also exempts employees who qualify as outside salespersons or administrative employees from the overtime requirement, and it defines and applies these exemptions in the same manner as the FLSA. See 12 N.Y.C.R.R. § 142-2.14(5); Galasso v. Eisman,

Zucker, Klein & Ruttenberg, 310 F. Supp. 2d 569, 575 (S.D.N.Y. 2004).[5]

California's wage and hour laws are essentially the same as the FLSA and New York law: employees are entitled to overtime for each hour worked above 40 in a week, provided they do not fall within certain exemptions. California law also exempts employees who qualify as outside salespersons or administrative employees—but the ways in which these exemptions are defined differs slightly. In order to qualify as an outside salesperson, sales activities must account for "more than half' of the employee's working time. Cal. Code Regs. Tit. 8, § 11070(2)(J). This "quantitative" test differs slightly from the "primary duty" test contained in the FLSA. Similarly, California's administrative exemption requires that an employee be "primarily engaged" in administrative tasks rather than having those tasks as his or her "primary duty," but otherwise it mirrors the federal exemption. Id. § 11070(1)(A)(2)(f).

Neither New York nor California law contains an analog to the FLSA's exemption for highly compensated employees.

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[5] The parties agree that there is no difference between the relevant provisions of the FLSA and New York law. (See Pl. Mem. in Support of Summ. Judg. ("Pl. Mem.") at 19-20; Def.'s Mem. in Support of Summ. Judg. ("Def. Mem.") at 9 fn.6.) Consequently, in the discussion that follows, the Court will analyze the applicability of the FLSA and New York exemptions together. See infra Parts IV.A and V.A.

DISCUSSION

III. Summary Judgment Standard of Review

Summary judgment is appropriate where the record demonstrates that "there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it "might affect the outcome of the suit under governing law...." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the initial burden of producing evidence on each material element of its claim or defense demonstrating that it is entitled to relief. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The evidence on each material element must be sufficient to entitle the movant to relief as a matter of law. Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004).

Once the moving party has made an initial showing that no genuine issue of material fact remains, the nonmoving party may not refute this showing solely by means of "[c]onclusory allegations, conjecture, and speculation," Niagara Mohawk Power Corp. v. Jones Chem., Inc., 315 F.3d 171, 175 (2d Cir. 2003) (internal citations and quotations omitted), but must instead present specific evidence in support of its contention that there is a genuine dispute as to material facts. Fed. R. Civ. P. 56(e). The Court resolves all ambiguities and draws all factual inferences in favor of the nonmovant, but "only if there is a 'genuine' dispute as to those facts." Scott v. Harris, 127 S.Ct. 1769, 1776 (2007) (citing Fed. R. Civ. P. 56(c)).

The same standard of review applies when the court is faced with cross-motions for summary judgment. Morales v. Quintel Entm't, Inc., 249 F.3d 115, 121 (2d Cir. 2001). Each party's motion must be reviewed on its own merits, and the Court must draw all reasonable inferences against the party whose motion is under consideration. Id.

IV. The Outside Sales Exemption

A. The FLSA and New York Law

In their motion for summary judgment, Plaintiffs argue that they do not fall within the outside sales exemption because they:

> fail to meet the essential prerequisite of the outside sales exemption: making sales. NPC Reps do not sell drugs to the doctors they visit. With physicians, Reps do not exchange any good or service, contract to sell any good or service, consign for sale any good or service, or obtain orders or contracts for the use of facilities. No money or title to drugs ever changes hands between Reps and doctors. Indeed, it is illegal for Reps to sell pharmaceuticals, and such a sale is cause for dismissal.

(Pls.' Mem. in Support of Summ. Judg. ("Pl. Mem.") at 3.) In other words, Plaintiffs claim they are not exempt because they do not execute sales within the plain meaning of the FLSA and the DOL regulations. (Pls.' Opp. to Def.'s Motion for Summ. Judg. ("Pl. Opp.") at 17 (citing Amendola v. Bristol-Myers Squibb Co., 558 F. Supp. 2d 459, 470 (S.D.N.Y.

2008).) Instead, Plaintiffs categorize their activities as mere "promotion," and therefore argue that they are entitled to overtime pay. (See id. at 22.)

Defendant NPC, in its motion for summary judgment, claims that Reps fall within the "long-standing judicial and common sense understandings of the 'outside sales' exemption." (Def.'s Mem. in Support of Summ. Judg. ("Def. Mem.") at 9.) It urges the Court to focus on the purpose of the exemption and the practicalities of the pharmaceutical industry in determining whether Reps are exempt. (Id. at 10.) Defendant argues that the prescriptions which Reps seek to elicit from the physicians they visit "are, in essence, orders for NPC drugs to be used by the patients in purchasing NPC's drugs from pharmacies. Without prescriptions, patients cannot buy the drugs and there is no sale...." (Id. at 15.) Moreover, Reps do not engage in non-exempt promotional work because they make solicitations for themselves rather than others—their compensation depends, in substantial measure, upon the prescriptions they generate. (Id. at 11-12.)

This Court must construe the outside sales exemption narrowly in order to ensure that it is only applied to those employees who fit "plainly and unmistakably within [its] terms and spirit." Bilyou, 300 F.3d at 222. In doing so, however, the Court must not lose sight of the FLSA's practical goals. Adopting Plaintiffs' constricted reading of the FLSA ignores the Act's spirit, purpose, and goals.

One of the earliest and clearest explanations of the rationale behind the outside sales exemption was

provided by the Tenth Circuit in Jewel Tea Co. v. Williams et al., 118 F.2d 202 (10th Cir. 1941):

> The reasons for excluding an outside salesman are fairly apparent. Such salesm[a]n, to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.

Id. at 207-08.

Jewel Tea teaches that outside salespersons are exempt from the overtime requirement not because they "sell," as that term is technically defined, but rather because they (1) generate commissions for themselves through their work and (2) work with minimal supervision, making adherence to an hours-based compensation scheme impractical. The Jewel Tea rationale is echoed in the DOL's 2004 Final Rule, which notes that the "white collar" exemptions owe their existence to the fact that the employees they were meant to cover "typically earned salaries well above the minimum wage, and they were

presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement...." 69 Fed. Reg. at 22124. The DOL Final Rule also recognizes that the work done by these employees "was difficult to standardize to any time frame...making compliance with the overtime provisions difficult...." Id.

Of course, the Court must first determine whether Reps engage in selling. Indeed, the DOL regulations and the case law are clear that the outside sales exemption cannot apply to any employee who does not make sales in some sense. 29 C.F.R. § 541.500; DOL 2004 Final Rule, 69 Fed. Reg. at 22162-63; see also Ackerman v. Coca-Cola Enterprises, Inc., 179 F.3d 1260, 1265 (10th Cir. 1999) (holding that the exemption cannot apply "if the employee in question does not actually consummate the sale....").

"Given the broad scope of the FLSA and its implementing regulations, which reach all employees involved in interstate commerce, see 29 U.S.C. §§ 202(a)-(b), 207(a)(1), the regulations provide only general guidance to accommodate the varying needs of employers and employees in a diverse and varied national economy." Havey v. Homebound Mortgage, Inc., 547 F.3d 158, 163 (2d Cir. 2008) (citation omitted). Recognizing this, courts have taken into account the characteristics of the industry in question when determining the applicability of the outside sales exemption. For example, in Nielsen v. DeVry, Inc., 302 F. Supp. 2d 747 (W.D. Mich. 2003), the court described the nature of plaintiff field representatives' interactions with potential students, as well as the nature of defendant school's

admissions process, before finding that the field representatives fell within the outside sales exemption. Id. at 755-56. Similarly, in Gregory v. First Title of America, Inc., No. 06-Civ.-1746, 2008 WL 150487 (M.D. Fla. Jan. 14, 2008), the court held that plaintiff, whose job was to refer customers to defendant insurance company, "obtained orders" and was therefore covered by the outside sales exemption even though "Plaintiff could not sell title insurance herself because she was not licensed to do so." Id. at *2 (also noting that plaintiff's "compensation was tied to how many orders for service she obtained").

In Medtronic, Inc. v. Gibbons, 527 F. Supp. 1085 (D. Minn. 1981), aff'd 684 F.2d 565 (8th Cir. 1982), a case dealing with a dispute over an employment contract, the district court described the nature of sales in the medical device industry as follows:

> The ultimate consumer[s] of pacemakers are cardiac patients, not hospitals or doctors. But the pacemakers are sold by the manufacturers to the hospital where the patient is being treated. The hospital purchases pacemakers on recommendations from a physician....Medtronic's sales effort focuses on the physicians and medical personnel. Thus, the term "customers" must include not only the hospital, which actually pays for the product, but also the physicians and surgeons who recommend which product to purchase.

Id. at 1094 fn.3.

The Medtronic court's description of sales in the medical device industry is instructive for understanding the nature of the sales made by Reps in the present case. The FDA regulates the pharmaceutical industry in myriad ways, controlling, among other things, how drugs may be researched, manufactured, labeled, sold, distributed, and prescribed. See 21 U.S.C. §§ 351 et seq. Legally, Reps cannot sell NPC drugs directly to physicians. (See Pls.' Rule 56.1 Statement of Undisputed Facts ("PSUF") ¶¶ 107, 109, 110, 112.) Further, physicians have an ethical obligation to prescribe only drugs suitable for their patients' medical needs, meaning that they cannot make a binding commitment to a Rep to prescribe certain NPC products. (See Pl. Opp. at 21 fn.13.) Nevertheless, like the physicians who had the authority to recommend the purchase of certain medical devices in Medtronic, the physicians called upon by Reps ultimately control the purchase of NPC products by writing prescriptions. In fact, in the present case, physicians are arguably more integral to sales than their counterparts in Medtronic because, absent a prescription from a doctor, the patient end-users of NPC drugs are not able to obtain those drugs. NPC spends in excess of $500 million annually to have its Reps meet on a frequent and repeat basis with these physicians to seek their commitments to prescribe NPC products. In other words, Reps make sales in the sense that sales are made in the pharmaceutical industry.

Moreover, as the First Circuit recently recognized in IMS Health Inc. v. Ayotte, __ F. 3d __, No. 07-1945, 2008 WL 4911262 (1st Cir. Nov. 18, 2008), Reps are highly effective at making sales. The

IMS Health court used the term "detailing" to refer to the work carried out by pharmaceutical sales representatives, explaining that "[d]etailing is the face-to-face advocacy of a product by sales representatives who visit doctors' offices and hospitals to meet with the prescribing health care professionals....[T]he objective of these visits is to make sales...." 2008 WL 4911262, at *26. "Detailing works: that it succeeds in inducing physicians to prescribe larger quantities of brand-name drugs seems clear....The fact that the pharmaceutical industry spends over $4,000,000,000 annually on detailing bears loud witness to its efficacy." Id. at *12. In recognition of the significant influence of Reps on physicians' prescribing habits—which arguably led physicians to prescribe brand-name pharmaceuticals instead of cheaper generic drugs—the IMS Health court upheld a New Hampshire law that limited Reps' access to physicians' prescribing histories on the grounds that these histories allowed Reps "to target particular physicians and shape their sales pitches accordingly." Id. at *1. The fact that the First Circuit's decision does not address the FLSA is of no consequence: it provides a clear, convincing, and practical discussion of the nature and effect of the Reps' work and, as such, supports the logical conclusion that Reps make sales.

Plaintiffs argue that "[NPC] sells drugs to distributors. Distributors sell drugs to pharmacies. Pharmacies sell drugs to individuals." (Oral Argument Transcript, Nov. 18, 2008 ("OA Tr.") at 5:9-10.) In other words, Plaintiffs ask this Court to conclude that the only true sales made by NPC are to distributors. The Court cannot ignore reality.

Distributors are not the end-users of NPC's products. If physicians did not prescribe NPC products, patients would be unable to buy them and distributors would have no incentive to make purchases from NPC. The purchase cycle commences with a prescription from physicians, who are therefore the appropriate target of the Reps' sales efforts. When the physician writes a prescription for the NPC product, then a sale can take place. "Without prescriptions, patients cannot buy the drugs and there is no sale." (Def. Mem. at 15.)

Plaintiffs' argument that Reps' activities constitute mere "promotional work" is simply wrong. Contrary to Plaintiffs' assertion that "[t]he DOL's current regulations reaffirm [a] promotion versus sales distinction" (Pl. Mem. at 21), the DOL in fact does not draw a distinction between "sales" and "promotion." Rather, the DOL distinguishes between promotional activities that are exempt, because they relate to the employee's own sales, and promotional activities that are non-exempt, because they pave the way for sales made by others. See 29 C.F.R. § 541.503(a) ("Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work."); see also Stein Report at 46 (stating that promotional employees "engaged in paving the way for salesmen" are not exempt); DOL 2004 Final Rule, 69 Fed. Reg. at 22162 (refusing to "[e]xtend[] the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales....").

Here, any promotional work Reps undertake is directed towards the consummation of their own sales, and therefore exempt. The incentive pay structure in the Reps' salaries is also a strong indicator that in some sense they are making a sale. Incentive payments are tied to the number of prescriptions written by physicians on a Rep's target list for drugs to which the Rep is assigned. (See Def. Opp. at 8; OA Tr. at 22:20-25:5.) Undoubtedly the incentives are substantial and average between $13,000 and $23,000 of the average salary of $91,500.

Plaintiffs argue that incentive payments do not necessarily match specific sales to specific Reps. It is uncontested that more than one Rep might visit a particular physician to discuss a particular drug, and factors other than a Rep's presentation might influence a physician's decision to prescribe an NPC product. (See Pl. Opp. at 22.) But there is nothing that requires a one-for-one match. (See, e.g., Prendergast Dep. at 91:12-19.) The incentive structure makes clear that it rewards a Rep's success in persuading physicians to write prescriptions. The more prescriptions written by the physicians covered by the Rep, the greater the incentive pay the Rep receives. As Defendant recognizes: "NPC's Sales Reps seek commitments for their 'own' account in the only practical sense that matters, namely that they receive incentive pay (and are evaluated) for prescriptions written by the physicians on whom they call." (Def. Opp. at 8.) The Reps themselves recognize this as well: in their yearly self-evaluations, they often emphasize their role in increasing market share for their assigned drugs by

persuading certain physicians to write prescriptions for those drugs. (See, e.g., Tobertga Dep. Ex. 3; Lopes Dep. Ex. 8.)[6] Reps therefore "'obtain a commitment to buy' from the customer and are credited with the sale." DOL 2004 Final Rule, 69 Fed. Reg. at 22162.

Given the FDA's regimen controlling how drugs are sold and delivered to patients, it is clear that Reps do not pave the way for sales that will be made by others. In Wirtz v. Keystone Readers Service, Inc., 418 F.2d 249 (5th Cir. 1969), the court was faced with a classic example of non-exempt promotional activity. Plaintiff employees promoted magazine subscriptions by going door-to-door and persuading customers to fill out a non-binding order card. Id. at

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[6] Just as Plaintiffs mischaracterize themselves as "robots" and "automatons" in an attempt to avoid a finding that they have discretion and exercise independent judgment (see infra Part V.A.2), here they argue that Reps are less than truthful in filling out their annual evaluation forms which describe their efforts to improve sales. Plaintiffs contend that their self-evaluations cannot be relied upon because "Reps exaggerate their efforts on calls and try to match NPC's proffered language regarding the criteria on which they are to be judged." (Pls.' Response to Def.'s Statement of Undisputed Facts ("Pls.' Response to DSUF") at 37.) NPC, however, is not evaluating its employees and compensating them up to 25% of their base salary based on so-called "exaggerations." Even if Reps make use of NPC "buzzwords," their yearly evaluations are realistic and known to involve a substantial part of their compensation. In her 2004 evaluation, for example, Plaintiff Simona Lopes identifies four specific doctors with whom she increased market share for the NPC drug Lotrel by specific percentages. (Lopes Dep. Ex. 8 at NPCXW&H120.) In that same review, her manager cited to her success with these doctors as evidence of her ability to "improv[e] Lotrel share in difficult to see customers...." (Id. Ex. 8 at NPCXW&H127.)

252. Later, "student managers" would call on the potential customers identified by the order cards and attempt to persuade the customers to enter into binding sales orders for more expensive items. Id. The situation in the present case is clearly different because there is no equivalent of the "student managers," i.e. there are no other NPC employees who consummate sales whose foundations were laid by the Reps. Reps are the only NPC employees who meet with physicians in an attempt to persuade them to write prescriptions. Nor is it a one-time event. The whole premise of assigned territories, with assigned physicians and frequent and repeated calls over time, is to build up a relationship so that with each call the physician is convinced that he or she will be treating patients appropriately by prescribing NPC products. To the extent these physicians write prescriptions for NPC drugs, it is the Reps—and not other NPC employees—who obtain these prescriptions and who receive credit for them by means of incentive payments.

Reps also enjoy the independence traditionally associated with outside salespersons. They work outside of NPC's offices and they have the ability, within certain reasonable limits, to set the schedule for their workday. Aside from the occasional "ride-along" with a manager (once every four to six weeks, i.e. 8-12 days in a year with over 200 work days), they are not subject to direct supervision. While NPC asserts that Reps work out of their homes, Plaintiffs vigorously argue they do not. (See Pls.' Response to DSUF at 2-3.) Plaintiffs are off on an unrelated tangent. The appropriate standard is whether the employee works away from his employer's place of

business. Reps clearly work outside of NPC's offices and therefore satisfy this requirement.

Plaintiffs further contend that, because of modern technology, Reps no longer enjoy "the degree of autonomy traditionally associated with outside salespersons" such as the salespersons in Jewel Tea. (Pl. Opp. at 23.) This argument is unconvincing. The salespersons in Jewel Tea were expected to report for work at 7 a.m. each day, were required to perform certain clerical tasks, kept logs of their work in "route books" that were subject to review by supervisors, and interacted with stock managers in order to obtain the items they sold. 118 F.2d at 204-05. Today's technology, such as cell phones and e-mail, may be quicker, but its function is still the same. Reps are not punching a clock and a manager is not looking over their shoulders. The autonomy they enjoy makes it more difficult to tie them to an hours-based compensation scheme—which is one of the factors the outside sales exemption is designed to take into account. See DOL 2004 Final Rule, 69 Fed. Reg. at 22124.

While courts have narrowly applied the outside sales exemption, see Ruggeri v. Boehringer Ingelheim Pharms., Inc., __ F. Supp. 2d __, No. 06-Civ.-1085, 2008 WL 4917850, at *3 (D. Conn. Nov. 17, 2008), recognizing the realities of the pharmaceutical industry is not incompatible with engaging in a narrow reading. To the contrary, it produces results that reflect the exemption's terms and spirit. Reps make sales by obtaining commitments to prescribe NPC drugs from physicians. They are credited with those sales and compensated accordingly by means of incentive

payments. They also work free of direct supervision. As such, under both the FLSA and New York law, they qualify as exempt outside salespersons.

B. California Law

Under California law, an outside salesperson is defined as "any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities." Cal. Code Regs. tit. 8, § 11070(2)(J). Thus, unlike the FLSA, which looks to the employee's "primary duty" to determine whether the outside sales exemption applies, 29 C.F.R. § 541.500(a)(1), the California exemption is "purely quantitative...focusing exclusively on whether the individual works more than half the working time selling or obtaining orders for contracts." Ramirez v. Yosemite Water Co., 20 Cal. 4th 785, 797 (1999) (internal quotation marks omitted).

Three recent decisions by federal courts in the Central District of California have held that pharmaceutical sales representatives qualify as exempt outside salespersons under California law. See Menes v. Roche Labs., Inc., No. 07-Civ.-1444, 2008 U.S. Dist. LEXIS 4230 (C.D. Cal. Jan. 7, 2008); Barnick v. Wyeth, 522 F. Supp. 2d 1257 (C.D. Cal. 2007); D'Este v. Bayer Corp.. No. 07-Civ.3206, 2007 U.S. Dist. LEXIS 87229 (C.D. Cal. Oct. 9, 2007). The California federal courts reached their decisions by (1) determining that interpretations of the FLSA have persuasive authority for interpreting California's wage and hour laws; and (2) employing

an "indicia of sales" analysis similar to the one employed in Nielsen, 302 F. Supp. 2d at 756-58, in order to conclude that pharmaceutical sales representatives qualified as outside salespersons under California law. See Barnick, 522 F. Supp. 2d at 1262; Menes, 2008 U.S. Dist. LEXIS 4230, at *4-*5; D'Este, 2007 U.S. Dist. LEXIS 87229, at *14 fn.2, *16.

Plaintiffs in the present matter argue that the recent California decisions were erroneously decided because they "are at war with the doctrine established by [Ramirez v. Yosemite Water Co.] that California's outside sales exemption is narrower and more favorable to employees than the FLSA's version." (Pl. Mem. at 26.)

Plaintiffs overstate the extent to which California's outside sales exemption offers greater protection to employees. Ramirez involved a plaintiff who carried out a dual function for his defendant employer—he acted as a deliveryman but he also made sales. 20 Cal. 4th at 790-94. Both the trial and appellate courts concluded that the plaintiff qualified as an outside salesperson because his "prime function" was making sales. Id. at 794. The California Supreme Court reversed and remanded the case for a determination as to whether the plaintiff spent "more than half' of his time engaged in sales work, as required by California's version of the outside sales exemption. Id. at 802-03. Thus, when Ramirez states that "[b]y choosing not to track the language of the federal exemption and instead adopting its own distinct definition of 'outside salespersons,' the [California Industrial Welfare Commission] evidently intended to depart from

federal law and to provide, at least in some cases, greater protection for employees," it is referring only to the greater protection afforded by California's quantitative test (under which a dual-function employee such as the plaintiff in Ramirez was likely non-exempt) in comparison to the FLSA's primary duty test (under which the plaintiff was likely exempt). Id. at 797.

The primary duty/quantitative distinction has no bearing on the present case because Reps do not serve a dual function—their function is to call on physicians in order to persuade them to write prescriptions for NPC's drugs. Thus, the only remaining question is whether the Reps function as salespersons. For all the reasons discussed above, see supra Part IV.A, the answer to that question is yes: within the parameters of the pharmaceutical industry, Reps make sales by persuading physicians to write prescriptions, which essentially serve as orders for NPC drugs.

Under California law, "[t]he activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed...under the Fair Labor Standards Act...." IWC Wage Order No. 4-2001-1(A)(2)(f); see also Nordquist v. McGraw-Hill Broad. Co., 32 Cal. App. 4th 555, 572-74 (1995). Ramirez, in highlighting the primary duty/quantitative distinction between the FLSA and California law, does nothing to upset this general principle of statutory interpretation. Having determined that Reps are exempt outside salespersons under the FLSA, this Court may apply the same analysis under California law so long as it determines that Reps spend "more than half" of their

time making sales. Ramirez implies that employees like the Reps, whose sole function is to make sales, will easily meet California's quantitative requirement. See 20 Cal. 4th at 801 ("If a salesperson must travel one hour to destination A in order to attempt a sale, then surely the most reasonable interpretation of the wage order is to count the hour of travel time as time spent 'selling.'"). Reps, then, are appropriately categorized as exempt outside salespersons under California law.[7]

V. The Administrative Exemption

A. The FLSA and New York Law

Even if Plaintiffs do not fall within the outside sales exemption, they are still not entitled to overtime under the FLSA or New York law because they fall within the administrative exemption. Plaintiffs meet each of the administrative exemption's requirements. Their average salary of $91,500 per year translates into a weekly salary of $1,760, which is nearly four times the statutory

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[7] Barnick, Wyeth, and D'Este have been criticized for relying too heavily on "indicia of sales"—such as the fact that the plaintiffs in those cases had sales-related job titles and received specialized sales training—rather than on a direct finding that the plaintiffs actually engaged in sales. See, e.g., Ruggeri, 2008 WL 4889813 at *13-*14. This Court agrees that indicia of sales may not be used as a substitute for an actual finding that an employee made sales in some sense. Nevertheless, it is significant that the Reps are hired, trained, paid and incentivized as sales personnel. Those facts are entitled to some weight, even if they are not solely dispositive.

minimum of $455 per week. Moreover, they engage in work that is directly related to the management or general business operations of NPC and they exercise discretion and independent judgment with respect to matters of significance.

1. Office or Non-Manual Work Directly Related to Management or General Business Operations

The first prong of the administrative exemption consists of two component parts. In order to be exempt, an employee must (1) "perform office or non-manual work" (2) "directly related to the management or general business policies of the employer." See 29 C.F.R. § 541.200(a).

In Reich v. John Alden Life Insurance Company 126 F.3d 1 (1st Cir. 1997), the First Circuit addressed the performance of office or non-manual work through the prism of the DOL's administrative/production dichotomy. John Alden involved the application of the administrative exemption to an insurance company's "marketing representatives," who were the company's primary contacts with the independent agents who ultimately sold the company's life insurance policies. 126 F. 3d at 3. The court held that the representatives did not perform "production" work because the insurance company's products were its insurance policies, and the representatives were not involved in creating those policies. Id. at 9. Rather, they were involved in marketing and promoting the policies—work that was "ancillary" to the insurance company's "principal production activity." Id. at 9-10.

Based upon the holding in John Alden, it is clear that Plaintiffs do not function as production employees. NPC's products are the pharmaceutical drugs that it researches, develops, and manufactures. (See PSUF ¶ 2.) Just as the representatives in John Alden played no role in producing insurance policies, the Reps here have nothing to do with producing NPC's drugs. Their work, like the work of the John Alden marketing representatives, is ancillary to their employer's production work.

With respect to the second part of the analysis, Plaintiffs claim that their work is not directly related to NPC's management or general business operations because they apply policies rather than craft them. In other words, Plaintiffs argue that they carry out day-to-day activities as opposed to performing the types of "high-level" functions the administrative exemption is designed to encompass. (See id. at 4.)

John Alden is instructive here, as well. The court held that the representatives' work was directly related to the insurance company's general business operations because by "disseminating information to the marketplace, understanding customers and competitors, and gathering available information," the representatives were "at the heart of John Alden's business success." John Alden, 126 F.3d at 11-12 & fn.8. The same can be said for NPC's Reps. The parties do not dispute that, in carrying out their duties, one of the Reps' primary functions is to provide information about NPC pharmaceuticals to the physicians they visit. (See PSUF ¶¶ 3, 4.) Moreover, Reps are the only NPC employees who meet directly with physicians. (See Def.'s Rule 56.1

Statement of Undisputed Facts ("DSUF") ¶ 8.) As Defendant claims, Reps "are critical in maintaining NPC's positive relationship with the medical community." (Def. Mem. at 20.)

In Amendola v. Bristol-Myers Squibb, the court reached a similar conclusion with respect to pharmaceutical sales representatives. The court determined that the defendant pharmaceutical company had demonstrated: (1) that the Reps represented the company in meetings with physicians; (2) that the Reps promoted the defendant's drugs; and (3) that defendant's business depended in part upon the Reps' success in educating physicians about its drugs. 558 F. Supp. 2d 459 at 476-77. Consequently, it was clear that the Reps "perform[ed] non-manual work directly related to the general business operations of the company." Id. at 476.[8] On the present record, there is no doubt that NPC's Reps meet with physicians and provide them with information about NPC drugs in an attempt to

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[8] In the only other decision in this Circuit to analyze the applicability of the administrative exemption to pharmaceutical sales representatives—Ruggeri—the court held that it could not make a determination as to whether the Reps' work was directly related to the defendant pharmaceutical company's general business operations because the record did not provide sufficient evidence of what the company's business operations entailed. 2008 WL 4889813 at *15-*16. Here, however, the Court is satisfied that NPC's general business operations can be said to involve researching, developing, manufacturing, marketing, and selling prescription pharmaceuticals. (Arena Aff. ¶ 4; see also DSUF ¶ 2; Pls.' Response to Def.'s 56.1 Statement at 2.) The Reps' work is directly related to these operations.

persuade the physicians to write prescriptions for those drugs. The Reps' success in obtaining prescriptions is critical to NPC's business. The sizeable incentive payments made to Reps for generating prescriptions, as well as the more than $500 million paid to the 6,000 Reps, buttresses the conclusion that obtaining prescriptions for its drugs is critical to NPC's success. There is no other rational explanation for the commitment of this level of financial resources to NPC's sales effort.

2. Exercise of Discretion and Independent Judgment with Respect to Matters of Significance

In Cote v. Burroughs Wellcome Co., 558 F. Supp. 883 (E.D. Pa. 1982), the court directly addressed the issue of whether the plaintiff "detailer" (as Reps were then known) exercised discretion and independent judgment with respect to matters of significance. The court determined that, notwithstanding the restrictions placed upon her activities by her employer (which mirror the FDA's restrictions on the marketing and sales of drug products), the detailer exercised considerable discretion. Specifically, the court found that the detailer (1) used initiative to increase sales of her assigned drugs by cultivating good working relationships with doctors and their staffs, and (2) used discretion in deciding how to encourage the use of her product. Id. at 887. The

court therefore concluded that the plaintiff detailer fell within the FLSA's administrative exemption.[9]

More recently, the court in Amendola reached a similar conclusion. The court determined that the plaintiff pharmaceutical sales representatives (1) "tailor[ed] the content of their presentations to each medical provider based on the provider's patient population, prescription practices, and other factors, and independently decide[d] what promotional message [would] be most effective"; (2) determined whether to request a "commitment" (analogous to a "close" in the present case) and, if a commitment request was appropriate, the nature of that commitment; (3) determined how often to visit each physician; (4) added new physicians to their call lists; (5) allocated their drug samples; and (6) decided how to spend their promotional budgets on meals and lecture programs for their physicians. 558 F. Supp. 2d at 477. Moreover, the court recognized as self-evident the fact that these discretionary activities related to matters of significance since "[Reps] seek to influence prescription writing practices—a matter of great consequence to [defendant's] business." Id. While the Amendola court's findings were made in determining whether notice to the potential plaintiff class was appropriate, id. at 462-63, it is instructive that the court found that the second requirement of the administrative exemption was likely satisfied. Id. at 477.

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[9] The court in Cote did not need to address the issue of whether the detailer performed work directly related to her employer's management or general business operations because the defendant employer conceded that she did. 558 F. Supp. at 886.

Cote and Amendola are directly applicable here. Plaintiff Reps engage in many of the same discretionary activities. Reps are expected to use initiative to increase the number of prescriptions written for their drugs—oftentimes, this involves building a good rapport with the physicians and their staffs. Within the confines of the "core messages" created by NPC, Reps must decide how best to present their information and must determine what type of "close" is most appropriate in a given situation. This, of course, depends on how much time the physician will allow the Rep, the physician's patient base and prescribing history, and numerous other factors. Reps set their daily call schedules and are expected to use their entertainment budgets to host informational events for the physicians on their target lists. In carrying out these activities, they are quite clearly attempting to increase prescriptions for their drugs—a matter of considerable significance for NPC. In short, the discretionary nature of their duties closely resembles that of the plaintiffs in Cote and Amendola.

Throughout their papers, and at oral argument, Plaintiffs have characterized themselves as mere "robots" or "automatons" who enjoy no room to act with discretion or independent judgment within the stringent confines of NPC's regulations. (See, e.g., Pl. Mem. at 12-15; OA Tr. at 32:5-18.) These labels are not facts, but merely arguments designed to avoid the overtime exemptions. They do not begin to answer why or how a robot or an automaton could or should earn an average salary of $91,500 per year. Nor do they explain why NPC would employ 6,000 Reps at a cost in excess of half a billion dollars per

year. They are an attempt to avoid the consequences of what Reps do every day—arranging to call on physicians and, after assessing how much time is available for the call, choosing the best possible approach to convince the physician to prescribe NPC drugs the next time an appropriate patient opportunity presents itself. NPC pays a good salary and material incentives to encourage this behavior. Reps are given drug samples, printed materials, and core messages. They are dispatched to the offices of physicians in an attempt to convince those physicians to prescribe NPC products. It defies logic to accept that, in such a situation, Reps are expected to do nothing but chant slogans and mouth platitudes. At the bare minimum, Reps must be capable of tailoring their presentation to a given timeframe—deciding how best to convey the "core message" in a manner that will have the desired effect on the physician. Such a decision involves making an independent judgment, free of direct oversight, even if NPC has provided Reps with guidelines for conveying certain information in a certain manner. Thus, while the exact nature of the discretion and independent judgment exercised by Reps may be in dispute, Cote and Amendola make clear that, on the present facts, NPC's Reps have discretion and exercise independent judgment.

Courts routinely hold that employees may exercise discretion and independent judgment, even when they carry out their duties within the confines of a highly regulated industry. See, e.g., Amendola, 558 F. Supp. 2d at 476 (recognizing that "courts have frequently concluded that the administrative exemption applies even in those situations in which

the employee's discretion in the performance of her duties is circumscribed by an employer's detailed instructions or industry regulations" (citations omitted)). At oral argument, Plaintiffs readily admitted that "because of the [pharmaceutical industry's] regulations, the [R]eps are tightly circumscribed." (OA Tr. at 33:9-10.) Within these regulations, however, the Reps do exercise ample discretion and make independent judgments. This fully satisfies the second requirement of the administrative exemption. Thus, under the FLSA and New York law, Plaintiffs are appropriately categorized as exempt administrative employees.

B. California Law

California employs a five-part test for determining whether an employee is covered by the state's administrative exemption. In order for the exemption to apply, the employee must: (1) perform "office or non-manual work directly related to management policies or general business operations" of the employer or its customers; (2) "customarily and regularly exercise...discretion and independent judgment"; (3) perform his or her duties under only general supervision; (4) be "primarily engaged" in activities meeting the test for the exemption; and (5) earn twice the state's minimum wage. Cal. Code Reg., tit. 8, § 11070(1)(A)(2). As is the case with the outside sales exemption, the primary difference between the FLSA and California versions of the administrative exemption is California's quantitative test. As previously discussed, Reps do not perform the types of dual functions that typically necessitate a quantitative analysis. Having determined that the function they do perform qualifies as administrative

under the FLSA, the Court need not undertake further analysis to conclude that Reps are similarly exempt administrative employees under California law.

VI. Highly Compensated Employee Exemption

Defendant identifies certain members of the Plaintiff class who it claims fall within the highly compensated employee exemption because (1) they earned at least $100,000 in annual compensation in the years 2004 through 2006, and (2) they customarily and regularly performed the duties of an administrative employee. (Def. Mem. at 27-28; App'x to Def. Mem. Tab 46.)[10] The Court has already determined that Plaintiffs are exempt from the FLSA's overtime requirement because they qualify as outside salespersons and administrative employees. Thus, to the extent the Plaintiffs identified by Defendant did, in fact, earn at least $100,000 in annual compensation between 2004 and 2006, they also meet the requirements for the highly compensated employee exemption. Since the Court has already held the Plaintiff class in its entirety exempt on other grounds, however, it need not reach the subordinate issue of whether certain Plaintiffs fall within this exemption.

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[10] According to NPC, of the nearly 700 members of the Plaintiff class, 42 earned total compensation in excess of $100,000 in 2004, 49 in 2005, and 31 in 2006. (App'x to Def. Mem. Tab 46.)

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is GRANTED Plaintiffs' motion for summary judgment is DENIED. The Clerk of the Court is directed to enter judgment and terminate this matter.

Dated: New York, New York
January 12, 2009

SO ORDERED

/s/ Paul A. Crotty
PAUL A. CROTTY
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE NOVARTIS WAGE AND HOUR LITIGATION

06 **MD** 1794 (PAC)

JUDGMENT

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Whereas the above-captioned action having come before this Court, and the matter having come before the Honorable Paul A. Crotty, United States District Judge, and the Court, on January 12, 2009 having rendered its Opinion and Order granting defendant's motion for summary judgment and denying plaintiffs' motion for summary judgment, and directing the Clerk of the Court to enter judgment and terminate this matter, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated January 12, 2009, defendant's motion for summary judgment is granted and plaintiffs' motion for summary judgment is denied; accordingly, the case is closed.

Dated: New York, New York
January 13, 2009

J. MICHAEL McMAHON

Clerk of Court

BY:

/s/

Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON _____

29 U.S.C. § 207

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date

of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * *

29 U.S.C. § 213

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub. L. 101–157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub. L. 101–157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations,

including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such

employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub. L. 93–259, § 23(a)(1), Apr. 8, 1974, 88 Stat. 69.

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub. L. 93–259, § 10(a), Apr. 8, 1974, 88 Stat. 63.

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub. L. 93–259, §§ 9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69.

(15) any employee employed on a casual basis in domestic service employment to provide

babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of title 5; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is—

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour.

* * * *

29 U.S.C. §203

§ 203. Definitions

As used in this chapter—

* * * *

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

* * * *

29 C.F.R. § 541

Subpart C—Administrative Employees

§ 541.200 General rule for administrative employees.

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(b) The term "salary basis" is defined at § 541.602; "fee basis" is defined at § 541.605; "board, lodging or other facilities" is defined at § 541.606; and "primary duty" is defined at § 541.700.

§ 541.201 Directly related to management or general business operations.

(a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or

general business operations of the employer or the employer's customers. The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

(b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

§ 541.202 Discretion and independent judgment.

(a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

(b) The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and

bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may

have the plan reviewed or revised by superiors before it is submitted to the client.

(d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. *See also* § 541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

(f) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to

matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

§ 541.203 Administrative exemption examples.

(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

(b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

(c) An employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing

all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(d) An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(e) Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption. However, personnel clerks who "screen" applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption. Such personnel clerks typically will reject all applicants who do not meet minimum standards for the particular job or for employment by the company. The minimum standards are usually set by the exempt human resources manager or other company officials, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other company officials. Thus, when the interviewing and screening functions are

performed by the human resources manager or personnel manager who makes the hiring decision or makes recommendations for hiring from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(f) Purchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.

(g) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

(h) Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient

knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.

(i) Comparison shopping performed by an employee of a retail store who merely reports to the buyer the prices at a competitor's store does not qualify for the administrative exemption. However, the buyer who evaluates such reports on competitor prices to set the employer's prices generally meets the duties requirements for the administrative exemption.

(j) Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

§ 541.204 Educational establishments.

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act also includes employees:

(1) Compensated for services on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government) exclusive of board, lodging or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and

(2) Whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.

(b) The term "educational establishment" means an elementary or secondary school system, an institution of higher education or other educational institution. Sections 3(v) and 3(w) of the Act define elementary and secondary schools as those day or residential schools that provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may also include nursery school programs in elementary education and junior college curriculums in secondary education. The term "other educational establishment" includes special schools for mentally or physically disabled or gifted children, regardless

of any classification of such schools as elementary, secondary or higher. Factors relevant in determining whether postsecondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools. Also, for purposes of the exemption, no distinction is drawn between public and private schools, or between those operated for profit and those that are not for profit.

(c) The phrase "performing administrative functions directly related to academic instruction or training" means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration.

(1) Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants, responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the

administration of the mathematics department, the English department, the foreign language department, etc.; academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements; and other employees with similar responsibilities.

(2) Jobs relating to building management and maintenance, jobs relating to the health of the students, and academic staff such as social workers, psychologists, lunch room managers or dietitians do not perform academic administrative functions. Although such work is not considered academic administration, such employees may qualify for exemption under § 541.200 or under other sections of this part, provided the requirements for such exemptions are met.

29 C.F.R. § 541

Subpart F—Outside Sales Employees

§ 541.500 General rule for outside sales employees.

(a) The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:

(1) Whose primary duty is:

(i) making sales within the meaning of section 3(k) of the Act, or

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

(b) The term "primary duty" is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

(c) The requirements of subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section.

§ 541.501 Making sales or obtaining orders.

(a) Section 541.500 requires that the employee be engaged in:

(1) Making sales within the meaning of section 3(k) of the Act, or

(2) Obtaining orders or contracts for services or for the use of facilities.

(b) Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(c) Exempt outside sales work includes not only the sales of commodities, but also "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." Obtaining orders for "the use of facilities" includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

(d) The word "services" extends the outside sales exemption to employees who sell or take orders for a

service, which may be performed for the customer by someone other than the person taking the order.

§ 541.502 Away from employer's place of business.

An outside sales employee must be customarily and regularly engaged "away from the employer's place or places of business." The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. However, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms during trips from city to city; these sample rooms should not be considered as the employer's places of business. Similarly, an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration (*i.e.*, one or two weeks) should not be considered as the employer's place of business.

§ 541.503 Promotion work.

(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending

upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this subpart may still qualify as an exempt employee under other subparts of this rule.

(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such an employee can be considered an exempt outside sales employee if the employee's primary duty is making sales or contracts. Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct

efforts toward the consummation of a sale, the work is not exempt outside sales work.

§ 541.504 Drivers who sell.

(a) Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. In determining the primary duty of drivers who sell, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including loading, driving or delivering products, shall be regarded as exempt outside sales work.

(b) Several factors should be considered in determining if a driver has a primary duty of making sales, including, but not limited to: a comparison of the driver's duties with those of other employees engaged as truck drivers and as salespersons; possession of a selling or solicitor's license when such license is required by law or ordinances; presence or absence of customary or contractual arrangements concerning amounts of products to be delivered; description of the employee's occupation in collective bargaining agreements; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; and proportion of earnings directly attributable to sales.

(c) Drivers who may qualify as exempt outside sales employees include:

(1) A driver who provides the only sales contact between the employer and the customers visited,

who calls on customers and takes orders for products, who delivers products from stock in the employee's vehicle or procures and delivers the product to the customer on a later trip, and who receives compensation commensurate with the volume of products sold.

(2) A driver who obtains or solicits orders for the employer's products from persons who have authority to commit the customer for purchases.

(3) A driver who calls on new prospects for customers along the employee's route and attempts to convince them of the desirability of accepting regular delivery of goods.

(4) A driver who calls on established customers along the route and persuades regular customers to accept delivery of increased amounts of goods or of new products, even though the initial sale or agreement for delivery was made by someone else.

(d) Drivers who generally would not qualify as exempt outside sales employees include:

(1) A route driver whose primary duty is to transport products sold by the employer through vending machines and to keep such machines stocked, in good operating condition, and in good locations.

(2) A driver who often calls on established customers day after day or week after week, delivering a quantity of the employer's products at each call when the sale was not significantly affected by solicitations of the customer by the delivering

driver or the amount of the sale is determined by the volume of the customer's sales since the previous delivery.

(3) A driver primarily engaged in making deliveries to customers and performing activities intended to promote sales by customers (including placing point-of-sale and other advertising materials, price stamping commodities, arranging merchandise on shelves, in coolers or in cabinets, rotating stock according to date, and cleaning and otherwise servicing display cases), unless such work is in furtherance of the driver's own sales efforts.

69 Fed. Reg. 22122

DEPARTMENT OF LABOR
Wage and Hour Division
29 CFR Part 541
RIN 1215-AA14

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: This document provides the text of final regulations under the Fair Labor Standards Act implementing the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales and computer employees. These exemptions are often referred to as the "white collar" exemptions. To be considered exempt, employees must meet certain minimum tests related to their primary job duties and, in most cases, must be paid on a salary basis at not less than minimum amounts as specified in pertinent sections of these regulations.

EFFECTIVE DATE: These rules are effective on August 23, 2004.

* * * *

SUPPLEMENTARY INFORMATION:

I. Summary of Major Changes and Economic Impact

The minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA) are among the nation's most important worker protections. These protections have been severely eroded, however, because the Department of Labor has not updated the regulations defining and delimiting the exemptions for "white collar" executive, administrative and professional employees. By way of this rulemaking, the Department seeks to restore the overtime protections intended by the FLSA.

Under section 13(a)(1) of the FLSA and its implementing regulations, employees cannot be classified as exempt from the minimum wage and overtime requirements unless they are guaranteed a minimum weekly salary and perform certain required job duties. The minimum salary level was last updated in 1975, almost 30 years ago, and is only $155 per week. The job duty requirements in the regulations have not been changed since 1949-almost 55 years ago.

Revisions to both the salary tests and the duties tests are necessary to restore the overtime protections intended by the FLSA which have eroded over the decades. In addition, workplace changes over the decades and federal case law developments are not reflected in the current regulations. Under the existing regulations, an employee earning only $8,060 per year may be classified as an "executive" and denied overtime pay. By comparison, a minimum

wage employee earns about $10,700 per year. The existing duties tests are so confusing, complex and outdated that often employment lawyers, and even Wage and Hour Division investigators, have difficulty determining whether employees qualify for the exemption. The existing regulations are very difficult for the average worker or small business owner to understand. The regulations discuss jobs like key punch operators, legmen, straw bosses and gang leaders that no longer exist, while providing little guidance for jobs of the 21st Century.

Confusing, complex and outdated regulations allow unscrupulous employers to avoid their overtime obligations and can serve as a trap for the unwary but well-intentioned employer. In addition, more and more, employees must resort to lengthy court battles to receive their overtime pay. In the Department's view, this situation cannot be allowed to continue. Allowing more time to pass without updating the regulations contravenes the Department's statutory duty to "define and delimit" the section 13(a)(1) exemptions "from time to time."

Accordingly, on March 31, 2003, the Department published a Notice of Proposed Rulemaking (68 FR 15560) suggesting changes to the Part 541 regulations, including the largest increase of the salary levels in the 65-year history of the FLSA. The proposed changes to the duties tests were designed to ensure that employees could understand their rights, employers could understand their legal obligations, and the Department could vigorously enforce the law.

During a 90-day comment period, the Department received 75,280 comments from a wide variety of employees, employers, trade and

professional associations, small business owners, labor unions, government entities, law firms and others. In addition, the Department's proposal prompted vigorous public policy debate in Congress and the media. The public commentary revealed significant misunderstandings regarding the scope of the "white collar" exemptions, but also provided many helpful suggestions for improving the proposed regulations.

After carefully considering all of the relevant comments, and as detailed in this preamble, the Department has made numerous changes from the proposed rule to the final rule, including the following:

* * * *

Salary

- The final rule nearly triples the current $155 per week minimum salary level required for exemption to $455 per week-a $30 per week increase over the proposal and a $300 per week increase over the existing regulations.
- The "highly compensated" test in the final rule applies only to employees who earn at least $100,000 per year, a $35,000 increase over the proposal.
- The "highly compensated" test in the final rule applies only to employees who receive at least $455 per week on a salary basis.
- The final regulation adds a new requirement that exempt highly compensated employees also must "customarily and regularly" perform exempt duties.

* * * *

Administrative

- The final rule eliminates the proposed "position of responsibility" test for the administrative exemption.
- The final rule eliminates the proposed "high level of skill or training" standard under the administrative exemption.
- The final rule retains the existing requirement (deleted in the proposed regulations) that exempt administrative employees must exercise discretion and independent judgment.

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II. Background

The FLSA generally requires covered employers to pay employees at least the federal minimum wage for all hours worked, and overtime premium pay of time-and-one-half the regular rate of pay for all hours worked over 40 in a single workweek. However, the FLSA includes a number of exemptions from the minimum wage and overtime requirements. Section 13(a) (1) of the FLSA provides an exemption from both minimum wage and overtime pay for "any employee employed in a bona fide executive, administrative, or professional capacity * * * or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act * * *)." 29 U.S.C. 213(a)(1).

Congress has never defined the terms "executive," "administrative," "professional," or "outside salesman." Although section 13(a)(1) was included in the original FLSA enacted in 1938, specific references to the exemptions in the legislative history are scant. The legislative history indicates that the section 13(a)(1) exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay. Further, the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium. *See* Report of the Minimum Wage Study Commission, Volume IV, pp. 236 and 240 (June 1981).

Pursuant to Congress' specific grant of rulemaking authority, the Department of Labor has issued implementing regulations, at 29 CFR Part 541, defining the scope of the section 13(a)(1) exemptions. Because the FLSA delegates to the Secretary of Labor the power to define and delimit the specific terms of these exemptions through notice-and-comment rulemaking, the regulations so issued have the binding effect of law. *See Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977).

The existing Part 541 regulations generally require each of three tests to be met for the

exemption to apply: (1) The employee must be paid a predetermined and fixed salary that is not subject to reductions because of variations in the quality or quantity of work performed (the "salary basis test"); (2) the amount of salary paid must meet minimum specified amounts (the "salary level test"); and (3) the employee's job duties must primarily involve executive, administrative or professional duties as defined by the regulations (the "duties tests").[1]

The major substantive provisions of the Part 541 regulations have remained virtually unchanged for 50 years. The FLSA became law on June 25, 1938, and the first version of Part 541 was issued later that year in October. 3 FR 2518 (Oct. 20, 1938). After receiving many comments on the original regulations, the Wage and Hour Division issued revised regulations in 1940. 5 FR 4077 (Oct. 15, 1940). *See also,* "Executive, Administrative, Professional * * * Outside Salesman" Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940) ("1940 Stein Report"). The Department issued the last major revision of the duties test regulatory provisions in 1949. 14 FR 7705 (Dec. 24, 1949). Also in 1949, an explanatory bulletin interpreting some of the terms in the regulatory provisions was published as Subpart B of Part 541.

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[1] A number of states arguably have more stringent exemption standards than those provided by Federal law. The FLSA does not preempt any such stricter State standards. If a State or local law establishes a higher standard than the provisions of the FLSA, the higher standard applies. *See* Section 18 of the FLSA, 29 U.S.C. § 218.

14 FR 7730 (Dec. 28, 1949). *See also*, Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) ("1949 Weiss Report"). In 1954, the Department issued the last major revisions to the regulatory interpretations of the "salary basis" test. 19 FR 4405 (July 17, 1954). After the initial minimum salary levels were set at $30 per week in 1938, the Department revised the Part 541 regulations to increase the salary levels in 1940, 1949, 1958, 1963, 1970 and 1975. 5 FR 4077 (Oct. 15, 1940); 14 FR 7705 (Dec. 24, 1949); 23 FR 8962 (Nov. 18, 1958); 28 FR 9505 (Aug. 30, 1963); 35 FR 883 (Jan. 22, 1970); 40 FR 7092 (Feb. 15, 1975). *See also*, Report and Recommendations on Proposed Revisions of Regulations, Part 541, under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (March 3, 1958) ("1958 Kantor Report").[2]

The framework of the existing Part 541 regulation is based upon the 1940 Stein Report, the 1949 Weiss Report and the 1958 Kantor report, which reflect the best evidence of the American workplace a half-century ago. The existing

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[2] Revisions to increase the salary rates in January 1981 were stayed indefinitely. 46 FR 11972 (Feb. 12, 1981). The Department also revised the regulations to accommodate statutory amendments to the FLSA in 1961, 1967, 1973, and 1992. 26 FR 8635 (Sept. 15, 1961); 32 FR 7823 (May 30, 1967); 38 FR 11390 (May 7, 1973); 57 FR 37677 (Aug. 19, 1992); 57 FR 46744 (Oct. 9, 1992).

regulation, therefore, reflects the structure of the workplace, the type of jobs, the education level of the workforce, and the workplace dynamics of an industrial economy that has long been altered. As the workplace and structure of our economy has evolved, so, too, must Part 541 be modernized to remain current and relevant. This necessary adaptation forms the philosophical underpinnings of this update and reflects the Department's efforts to remain true to the intent of Congress, which mandated that the DOL "from time to time" define and delimit these exemptions and the myriad terms contained therein.

The Department notes, however, that much of the reasoning of the Stein, Weiss and Kantor reports remains as relevant as ever. This preamble notes such instances, and articulates why the reasoning is still sound. However, while the Department carefully has reviewed these reports in undertaking this update, it is not bound by the reports. The Department is responsible for updating regulations that, with each passing decade of inattention, have become increasingly out of step with the realities of the workplace. Indeed, under this rulemaking, the Department is charged with utilizing record evidence submitted in 2003 * * * not in the 1940s or 1950s * * *in exercising its discretion to update the terms of this Part.

Suggested changes to the Part 541 regulations have been the subject of extensive public commentary for two decades, including public comments responding to an Advance Notice of Proposed Rulemaking issued by the Department in

November 1985,[3] a March 1995 oversight hearing by the Subcommittee on Workforce Protections of the Committee on Economic and Educational Opportunities, U.S. House of Representatives, a report issued by the General Accounting Office (GAO) in September 1999,[4] and a May 2000 hearing before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce, U.S. House of Representatives. In its 1999 report to Congress and at the May 2000 hearing, the GAO chronicled the background and history of the exemptions, estimated the number of workers who might be included within the scope of the exemptions, identified the major concerns of employers and employees regarding the exemptions, and suggested possible solutions to the issues of concern raised by the affected interests. In general, the employers contacted by the GAO were concerned that the regulatory tests are too complicated, confusing, and outdated for the modern workplace, and create potential liability for violations when errors in classification occur. Employers were particularly concerned about potential liability for violations of the complex "salary basis" test, and complained that the "discretion and independent judgment" standard for administrative employees is confusing and applied inconsistently by the Wage and Hour Division. They also noted the traditional limits of the exemptions have blurred in the modern

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[3] 50 FR 47696 (Nov. 11, 1985).

[4] Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place, GAO/HEHS-99-164, September 30, 1999 (GAO Report).

workplace. Employee representatives contacted by the GAO, in contrast, were most concerned that the use of the exemptions be limited to preserve existing overtime work hour limits and the 40-hour standard workweek for as many employees as possible. They believed thc tests have become weakened as applied today by judicial rulings and do not adequately restrict employers' use of the exemptions. When combined with the low salary test levels, the employee representatives felt hat few protections remain, particularly or low-income supervisory employees. The GAO Report noted that the conflicting interests affected by these rules have made consensus difficult and that, since the FLSA was enacted, the interests of employers to expand the white collar exemptions have competed with those of employees to limit use of the exemptions. To resolve the issues presented, the GAO suggested that employers' desires for clear and unambiguous regulatory standards must be balanced with employees' desires for fair and equitable treatment in the workplace. The GAO recommended that the Secretary of Labor comprehensively review the regulations and restructure the exemptions to better accommodate today's workplace and to anticipate future workplace trends.

Responding to the extensive public commentary, on March 31, 2003, the Department published proposed revisions to these regulations in the **Federal Register** inviting public comments for 90 days (*see* 68 FR 15560; March 31, 2003). In response to the proposed rule, the Department received a total of 75,280 comments during the official comment period. The Department received comments from a wide variety of individuals, employees, employers,

trade and professional associations, labor unions, governmental entities, Members of Congress, law firms, and others. Most of the comments received were form letters submitted by e-mail or facsimile. Form letters expressing general support of the proposal were received, for example, from members of the Society for Human Resource Management and from individuals who identified themselves as being in agreement with the HR Policy Association or the National Funeral Directors Association. More than 90 percent of the comments were form letters generated by organizations affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) expressing general opposition to the proposal. These largely identical submissions raise concerns that the proposal would, for example, "diminish the application of overtime pay and seriously erode the 40 hour workweek" and lead to "[c]utting overtime pay" which "would really hurt America's working families." The form letters, however, do not address any particular aspect of the changes being proposed to the existing regulations. Indeed, some letters and emails appear to be from individuals who clearly perform non-exempt duties and are not covered by the Part 541 exemptions.

Approximately 600 of the comments include substantive analysis of the proposed revisions. Virtually all of these 600 comments favor some change to the existing regulations. Among the commenters there are a wide variety of views on the merits of particular sections of the proposed regulations. Acknowledging that there are strong views on the issues presented in this rulemaking, the Department has carefully considered all of the

comments and the arguments made for and against the proposed changes.

The major comments received on the proposed regulatory changes are summarized below, together with a discussion of the changes that have been made in the final regulatory text in response to the comments received. In addition to the more substantive comments discussed below, the Department received some editorial suggestions, some of which have been adopted and some of which have not. A number of other minor editorial changes have been made to better organize or structure the regulatory text. Finally, a number of comments were received on issues that go beyond the scope or authority of these regulations (such as eliminating all exemptions from overtime, lowering the overtime threshold to fewer hours worked per week or per day, banning all mandatory overtime, and basing overtime on a twoweek/ 80-hour limit), which the Department will not address in the discussion that follows.

III. Authority of the Secretary of Labor

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Several commenters, including the AFL-CIO, claim that the proposal exceeds the authority of the Secretary and will not be entitled to judicial deference. They assert that the proposal improperly broadens the exemptions, fails to safeguard employees from being misclassified, and is not consistent with Congressional intent. As an initial matter, the Supreme Court's decision in *Auer* confirmed the Secretary's "broad authority" to define and delimit these exemptions. 519 U.S. at 456.

Moreover, as this preamble establishes, the final rule will simplify, clarify and better organize the regulations defining and delimiting the exemptions for administrative, executive and professional employees. Rather than broadening the exemptions, the final rule will enhance understanding of the boundaries and demarcations of the exemptions Congress created. The final rule will protect more employees from being misclassified and reduce the likelihood of litigation over employee classifications because both employees and employers will be better able to understand and follow the regulations.

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IV. Summary of Major Comments

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Structure and Organization

The existing Part 541 contains two subparts. Current Subpart A provides the regulatory tests that define each category of the exemption (executive, administrative, professional, and outside sales). Current Subpart B provides interpretations of the terms used in the exemptions. Subpart B was first issued as an explanatory bulletin in 1949 (effective in January 1950) to provide guidance to the public on how the Wage and Hour Division interpreted and applied the exemption criteria when enforcing the FLSA.

The Department proposed to eliminate this distinction between the "regulations" in Subpart A and the "interpretations" in Subpart B. The proposed

rule also reorganized the subparts according to each category of exemption, eliminated outdated and uninformative examples, updated definitions of key terms and phrases, and consolidated provisions relevant to several or all of the exemption categories into unified, common sections to eliminate unnecessary repetition (*e.g.*, a number of sections pertaining to salary issues were proposed to be consolidated into a new Subpart G, Salary Requirements, discussed below). The proposed rule also streamlined, reorganized, and updated the regulations in other ways. The proposed regulations utilized objective, plain language in an attempt to make the regulations more understandable to employees and employee representatives, small business owners and human resource professionals. This proposed restructuring of Part 541 was intended to consolidate and streamline the regulatory text, reduce unnecessary duplication and redundancies, make the regulations easier to understand and decipher when applying them to particular factual situations, and eliminate the confusion regarding the appropriate level of deference to be given to the provisions in each subpart.

The proposed regulations also streamlined the existing regulations by adopting a single standard duties test for each exemption category, rather than the existing "long" and "short" duties tests structure. Because of the outdated salary levels, the "long" duties tests have, as a practical matter, become effectively dormant. As the American Payroll Association states, the "long" duties tests have "become 'inoperative' because of the extremely low minimum salary test ($155 per week) and federal

courts' refusal to apply the percentage restrictions on nonexempt work in the modern workplace." The U.S. Chamber of Commerce similarly notes that the "elements unique to the long test have largely been dormant for some time due to the compensation levels." The U.S. House of Representatives' Committee on Education and the Workforce also comments that the "long" duties tests have "become rarely, if ever, used." The Fisher & Phillips law firm notes that "the 'long' test has played little role in the executive exemption's application for many years." Similarly, the American Bakers Association notes that the "long" duties tests "lack[] current relevance." Finally, the National Association of Federal Wage Hour Consultants states that the "long" duties tests are "seldom used today in the business community." Faced with this reality, the Department decided that elimination of most of the "long" duties tests requirements is warranted, especially since the relatively small number of employees currently earning from $155 to $250 per week, and thus tested for exemption under the "long" duties tests, will gain stronger protections under the increased minimum salary level which, under the final rule, guarantees overtime protection for all employees earning less than $455 per week ($23,660 annually). Further, as explained in the preamble to the proposed rule, the former tests are complicated and require employers to time-test managers for the duties they perform, hour-by-hour in a typical workweek. Reintroducing these effectively dormant requirements now would add new complexity and burdens to the exemption tests that do not currently apply. For example, employers are not generally required to maintain any records of daily or weekly hours worked by

exempt employees (*see* 29 CFR 516.3), nor are they required to perform a moment-by-moment examination of an exempt employee's specific duties to establish that an exemption is available. Yet reactivating the former strict percentage limitations on nonexempt work in the existing "long" duties tests could impose significant new monitoring requirements (and, indirectly, new recordkeeping burdens) and require employers to conduct a detailed analysis of the substance of each particular employee's daily and weekly tasks in order to determine if an exemption applied. When employers, employees, as well as Wage and Hour Division investigators applied the "long" test exemption criteria in the past, distinguishing which specific activities were inherently a part of an employee's exempt work proved to be a subjective and difficult evaluative task that prompted contentious disputes. Moreover, making such finite determinations would become even more difficult in light of developments in case law that hold that an exempt employee's managerial duties can be carried out at the same time the employee performs nonexempt manual tasks. *See, e.g.*, *Jones v. Virginia Oil Co.*, 2003 WL 21699882, at *4 (4th Cir. 2003) (assistant manager who spent 75 to 80 percent of her time performing basic line-worker tasks held exempt because she "could simultaneously perform many of her management tasks"); Donovan v. Burger King Corp., 672 F.2d 221, 226 (1st Cir. 1982) ("an employee can manage while performing other work," and "this other work does not negate the conclusion that his primary duty is management"). Accordingly, given these developments, the Department believed that the percentage limitations on particular duties

formerly applied under the "long" tests were not useful criteria that should be reintroduced for defining the "white collar" exemptions in today's workplace, and that employees who would have been tested under the "long" tests are better protected by the final rule's guarantee of overtime protection to all employees earning less than $455 per week.

Most comments addressing the structure and organization of the proposed rule generally favor the proposed restructuring, indicating the consolidation of the former regulations and interpretations into a unified set of rules and other proposed changes provide needed simplification and more clarity to a complex regulation. The weight of comments support replacing the former "long" and "short" test structure with the proposed standard tests and deleting the former "long" test percentage limits on performing nonexempt duties.[5] For example, the U.S. Chamber

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[5] *See, e.g.*, Comments of American Bakers Association; American Corporate Counsel Association; American Hotel and Lodging Association; American Insurance Association; American Nursery and Landscape Association; American Payroll Association; American Network of Community Options and Resources (ANCOR); Associated Builders and Contractors; Associated Prevailing Wage Contractors; Colley & McCoy Company; Contract Services Association of America; Financial Services Roundtable; Grocery Manufacturers of America; National Association of Chain Drug Stores; National Association of Manufacturers; National Council of Agricultural Employers; National Grocers Association; National Newspaper Association; National Restaurant Association; National Small Business Association; New Jersey Restaurant Association; Pennsylvania Credit Union Association; Public Sector FLSA Coalition; Society for Human Resource Management; State of Oklahoma Office of Personnel Management; Tennessee Valley

of Commerce comments that it was their members' experience that the percentage limitations have been difficult to apply and have been of little utility. The Associated Prevailing Wage Contractors states that the percentage requirements created additional and needless recordkeeping requirements. The National Small Business Association comments that a move away from a percentage basis test will alleviate the burden on small business owners.

However, some commenters oppose these changes, asserting that they weakened the requirements for exemption, would allow manipulation of job titles to evade paying overtime to lower-level employees, would open the floodgates to misclassification of employees, and lead to more lawsuits. Some commenters state that the proposed language is too simple for this complex subject or that the proposed language continues to be vague in some areas, making it susceptible to differing interpretations and a continuation of an overly complex subject under the law. Other dissenting comments point to a loss of judicial and opinion letter interpretative precedent that would occur by changing the duties tests as the Department proposed.[6]

Authority; the U.S. Chamber of Commerce; and Virginia Department of Human Resource Management.

[6] *See, e.g.*, Comments of 9-5 National Association of Working Women; AFL-CIO; American Federation of State, County and Municipal Employees; American Federation of Teachers; Building and Construction Trades Department, AFL-CIO; Communication Workers of America; International Association of Fire Fighters; International Association of Machinists and

The Department has carefully considered these arguments, and continues to believe that reducing the inherent complexity of the exemption criteria by replacing the subjective and effectively dormant "long" test requirements is an essential goal to be pursued in this rulemaking. Streamlining and simplification of the applicable standards is critical to ensuring correct interpretations and proper application of the exemptions in the workplace today. It serves no productive interest if a complicated regulatory structure implementing a statutory directive means that few people can arrive at a correct conclusion, or that many people arrive at different conclusions, when trying to apply the standards to widely varying and diverse employment settings. The extensive public comments on the difficulties experienced under the existing regulatory standards amply demonstrate the need for change, in the Department's view. The comments suggesting there is no need to change the current regulatory "long" and "short" test structure are not persuasive when contrasted with the described difficulties under the existing regulatory standards, as confirmed by many other commenters. The Department also does not agree with the comments suggesting that elimination of the "long" test percentage limitations on nonexempt work, which are rarely applied today, and retention of the primary duty approach as currently interpreted by federal courts, will somehow

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Aerospace Workers; International Federation of Professional & Technical Engineers; National Employment Law Project; New York State Public Employees Federation; United Food and Commercial Workers Union; Weinberg, Roger and Rosenfeld; and World at Work.

increase litigation or decrease the protections currently afforded to employees. Rather, we believe that employees are more clearly protected by the final rule, which guarantees overtime protection to all employees earning less than $455 per week, than by the existing rule which contains confusing and differing requirements for employees earning between $155 and $455 per week. Moreover, as explained in more detail in Subpart B of the preamble, the Department's final "standard" duties test for the executive exemption incorporates the "authority to hire or fire" requirement from the existing long test.

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Subpart C, Administrative Employees

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Section 541.202 Discretion and Independent Judgment (Proposed "Position of Responsibility")

As discussed above, the Department has decided to eliminate the proposed "position of responsibility" requirement. Thus, the final rule deletes proposed section 541.202 defining "position of responsibility," proposed section 541.203 defining "substantial importance," and proposed section 541.204 defining "high level of skill or training." Instead, the final rule reinserts the "discretion and independent judgment" requirement, and defines that term at final section 541.202. Some of the language in proposed sections 541.203 and 541.204 was retained from the existing regulations and also appears in the final regulations as described below. The language from proposed

section 541.204 regarding the use of manuals has been moved to a new section in Subpart H, Definitions and Miscellaneous Provisions, and is discussed under that subpart.

The Department continues to believe, as most commenters confirm, that the current discretion and independent judgment standard has caused confusion and unnecessary litigation. Even in the 1949 Weiss Report, the Department recognized that the "discretion and independent judgment" standard was somewhat subjective, and the difficulty of applying the standard consistently has increased with the passing decades. As evidenced by the increasing court litigation, it has become progressively more difficult to apply the standard with the creation of many new jobs that did not exist 50 years ago. Nonetheless, the vast majority of commenters express concern that abandoning the "discretion and independent judgment" standard entirely would create even more uncertainty and litigation. We also recognize the benefit of retaining the standard in some form so as not to jettison completely decades of federal court decisions and agency opinion letters.

Accordingly, while retaining this standard from the existing regulations, final section 541.202 clarifies the definition of discretion and independent judgment to reflect existing federal case law and to eliminate outdated and confusing language in the existing interpretive guidelines. The Department intends the final rule to clarify the existing standard and to make the standard easier to understand and apply to the 21st Century workplace.

Final section 541.202(a) thus restates the requirement that the exempt administrative

employee's primary duty must "include" the exercise of discretion and independent judgment and includes the general definition of this term, taken word-for-word from the existing interpretive guideline at subsection 541.207(a): "In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." The requirement that the primary duty must "include" the exercise of discretion and independent judgment-rather than "customarily and regularly" exercise discretion and independent judgment-is not a change from current law. Although the Department is aware that there has been some confusion regarding the appropriate standard under the existing "short" duties test, federal court decisions have recognized that the current "short" duties test does not require that the exempt employee "customarily and regularly" exercise discretion and independent judgment, as does the effectively dormant "long" test. *See, e.g., O'Dell v. Alyeska Pipeline Service Co.*, 856 F.2d 1452, 1454 (9th Cir. 1988) (district court erred in not applying more lenient "includes" standard under short test which made a difference in determining whether employee was exempt); *Dymond v United States Postal Service*, 670 F.2d 93, 95 (8th Cir. 1982) (while the "long" duties test for the administrative exemption requires that the employee "customarily and regularly" exercise discretion and independent judgment, when an employee makes more than $250 a week, "that requirement is reduced to requiring that the employee's primary duty simply 'includes

work requiring the exercise of discretion and independent judgment').

Also retained from existing subsection 541.207(a), the final subsection 541.202(a) provides that discretion and independent judgment must be exercised "with respect to matters of significance." Final subsection 541.202(a) states that the term "matters of significance" refers to "the level of importance or consequence of the work performed." This concept of the importance or high level of work performed does not appear as a regulatory requirement in existing section 541.2, but is included twice in the existing interpretive guidance. Existing section 541.205(a), defining the primary duty requirement, states that the administrative exemption is limited "to persons who perform *work of substantial importance* to the management or operation of the business." This language was the basis of the "work of substantial importance" option in the proposed definition of'position of responsibility." Existing section 541.207(a), defining the term "discretion and independent judgment" provides that an exempt administrative employee "has the authority or power to make an independent choice, free from immediate direction or supervision and *with respect to matters of significance.*"

The existing regulations use these two different phrases found in two different sections to describe the same general concept-that the work performed by an exempt administrative employee must be significant, substantial, important, or of consequence. *See, e.g., Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527, 535-43 (7th Cir. 1999). The words "substantial" and "significant" are synonyms. Existing section 541.207(d) describes the "matters of

significance" concept as requiring that "the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence." Further, existing section 541.205 and existing section 541.207 use some of the same examples *(i.e.,* personnel clerks, inspectors, buyers) to illustrate the meaning of "substantial importance" and the meaning of "matters of significance."

Describing the same concept using two different phrases in two different sections of the existing interpretive guidelines is duplicative and confusing. Accordingly, the final rule chooses one phrase-"matters of significance"-and makes that phrase part of the regulatory test for the administrative exemption, rather than merely interpretive guidance. As described below, final subsections 541.202(b) through (f) combine language from existing section 541.205, existing section 541.207, and current case law to more clearly define and delimit this concept.

Final subsection 541.202(b) begins with language from existing section 541.207(b) stating that the phrase 'discretion and independent judgment' must be applied in the light of all the facts involved in the particular employment situation in which the question arises." Final subsection 541.202(b) then contains the following non-exclusive list of factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance:

> [W]hether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;

> whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

These factors were taken from the existing regulations, *see* 541.205(b), 541.205(c) and 541.207(d), or developed from facts which federal courts have found relevant when determining whether an employee exercises discretion and independent judgment. Federal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment, although a case-by-case

analysis is required. *See, e.g., Bondy v. City of Dallas,* 2003 WL 22316855, at *1 (5th Cir. 2003) (making recommendations to management on policies and procedures); *McAllister v. Transamerica Occidental Life Insurance Co.*, 325 F.3d 997, 1000-02 (8th Cir. 2003) (independent investigation and resolution of issues without prior approval; authority to waive or deviate from established policies and procedures without prior approval); *Cowart v. Ingalls Shipbuilding, Inc.*, 213 F.3d 261, 267 (5th Cir. 2000) (developing guidebooks, manuals, and other policies and procedures for employer or the employer's customers); *Piscione,* 171 F.3d at 535-43 (making recommendations to management on policies and procedures); *Haywood v. North American Van Lines, Inc.*, 121 F.3d 1066, 1071-73 (7th Cir. 1997) (negotiating on behalf of the employer with some degree of settlement authority; independent investigation and resolution of issues without prior approval; authority to waive or deviate from established policies and procedures without prior approval); *O'Neill-Marino v. Omni Hotels Management Corp.*, 2001 WL 210360, at *8-9 (S.D.N.Y. 2001) (negotiating on behalf of the employer with some degree of settlement authority; developing guidebooks, manuals, and other policies and procedures for employer or the employer's customers); *Strickerv. Eastern Off-Road Equipment, Inc.*, 935 F. Supp. 650, 656-59 (D. Md. 1996) (authority to commit employer in matters that have financial impact); *Reich v. Haemonetics Corp.*, 907 F. Supp. 512, 517-18 (D. Mass. 1995) (negotiating on behalf of the employer with some degree of settlement authority; authority to commit employer in matters that have financial impact); *Hippen v.*

First National Bank, 1992 WL 73554, at *6 (D. Kan. 1992) (authority to commit employer in matters that have financial impact). Other factors which federal courts have found relevant in assessing whether an employee exercises discretion and independent judgment include the employee's freedom from direct supervision, personnel responsibilities, trouble shooting or problem-solving activities on behalf of management, use of personalized communication techniques, authority to handle atypical or unusual situations, authority to set budgets, responsibility for assessing customer needs, primary contact to public or customers on behalf of the employer, the duty to anticipate competitive products or services and distinguish them from competitor's products or services, advertising or promotion work, and coordination of departments, requirements, or other activities for or on behalf of employer or employer's clients or customers. *See, e.g.*, *Hogan v. Allstate Insurance Co.*, 2004 WL 362378 (11th Cir. 2004); *Demos v. City of Indianapolis*, 302 F.3d 698 (7th Cir. 2002); *Lutz v. Ameritech Corp.*, 2000 WL 245485 (6th Cir. 2000); *Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326 (5th Cir. 2001); *Heidtman v. County of El Paso*, 171 F.3d 1038 (5th Cir. 1999); *Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527 (7th Cir. 1999); *Shockleyv. City of Newport News*, 997 F.2d 18 (4th Cir. 1993); *West v. Anne Arundel County, Maryland*, 137 F.3d 752 (4th Cir.), *cert. denied*, 525 U.S. 1048 (1998); *Reich v. John Alden Life Insurance Co.*, 126 F.3d1 (1st Cir. 1997); *Wilshin v. Allstate Insurance Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002); *Roberts v. National Autotech, Inc.*, 192 F. Supp. 2d 672 (N.D. Tex. 2002); *Orphanos*

v. Charles Industries, Ltd., 1996 WL 437380 (N.D. Ill. 1996).

Most of the remaining subsections in final 541.202 contain language from the existing regulations. Final subsection 541.202(c) contains language from existing section 541.207(a) and existing section 541.207(e) providing that "discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision." However, "employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level." Final subsection (c) also retains the credit manager and management consultant examples from existing section 541.207(e)(2). Final subsection 541.202(d) contains language from existing section 541.205(c)(6) providing that the "fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance." Final subsection 541.202(e) contains language from existing sections 541.207(c)(1) and 541.207(c)(2) stating that the exercise of discretion and independent judgment "must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." As in existing section 541.205(c), final subsection 541.202(e) provides that the exercise of discretion and independent judgment "does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work." Final subsection 541.202(f) includes language from

existing section 541.205(c)(2) that an employee "does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly."

In sum, as in the existing regulations, the final administrative exemption regulations establish a two-part inquiry for determining whether an employee performs exempt administrative duties. First, what type of work is performed by the employee? Is the employee's primary duty the performance of work directly related to management or general business operations? Second, what is the level or nature of the work performed? Does the employee's primary duty include the exercise of discretion and independent judgment with respect to matters of significance? *See, e.g., Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1125-26 (9th Cir. 2002) (looking to both the type of work and the importance of the work). By retaining the "discretion and independent judgment" standard from the existing regulations, as clarified to reflect current case law, and combining the existing concepts of "substantial importance" and "matters of significance," the final rule provides clarity while at the same time maintaining continuity with the existing regulations.

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Section 541.203 Administrative Exemption Examples

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In cases such as *Reich v. John Alden Life Insurance Co.*, 126 F.3d 1 (1st Cir. 1997), *Hogan v.*

Allstate Insurance Co., 2004 WL 362378 (11th Cir. 2004), and *Wilshin v. Allstate Insurance Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002), federal courts have found employees who represent the employer with the public, negotiate on behalf of the company, and engage in sales promotion to be exempt administrative employees, even though the employees also engaged in some inside sales activities. In contrast, the court in *Casas v. Conseco Finance Corp.*, 2002 WL 507059, at *9 (D. Minn. 2002), held that the administrative exemption was not available for employees who had a "primary duty to sell [the company's] lending products on a day-to-day basis" directly to consumers and failed to exercise discretion and independent judgment.

The John Alden case involved the exempt status of marketing representatives working for a company that designed, created and sold insurance products, primarily for businesses that were purchasing group coverage for their employees. The marketing representatives did not sell through direct contacts with the ultimate customers, but instead relied upon licensed independent insurance agents to make sales of the employer's financial products. The marketing representatives were responsible for maintaining contact with hundreds of such independent sales agents to keep them apprised of the employer's financial products, to inform them of changes in prices, and to discuss how the products might fit their customers' needs. The marketing representatives also would inform the employer of anything they learned from the independent sales agents, such as information about a competitor's products or pricing. The First Circuit ruled that these activities were directly related to management

policies or general business operations and that the marketing representatives were exempt. Their activities involved "servicing" of the business because their work was "in the nature of 'representing the company' and 'promoting sales' of John Alden products, two examples of exempt administrative work provided by § 541.205(b) of the interpretations." 126 F.3d at 10. Thus, the court concluded that the marketing representatives' contact with the independent sales agents involved 'something more than routine selling efforts focused simply on particular sales transactions.' Rather, their agent contacts are 'aimed at promoting (*i.e.*, increasing, developing, facilitating, and/or maintaining) customer sales generally,' activity which is deemed administrative sales promotion work under section 541.205(b)." *Id.* (citations omitted, emphasis in original), quoting *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896, 905 (3rd Cir. 1991), *cert. denied*, 503 U.S. 936 (1992).

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Subpart F, Outside Sales Employees

Section 541.500 General Rule for Outside Sales Employees

Section 13(a)(1) of the FLSA contains a separate exemption for any employee employed "in the capacity of outside salesman." Proposed section 541.500 set forth the general rule for exemption of

such "outside sales" employees.[11] Under proposed subsection 541.500(a), the outside sales exemption applied to any employee "with a primary duty of (i) making sales within the meaning of section 3(k) of the Act, or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." In addition, to qualify for exemption the outside sales employee must be "customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." Finally, proposed subsection 541.500(b) stated that in determining the primary duty of an outside sales employee, "work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work." Under this subsection, other work that furthers the employee's sales effort, including "writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences," is also considered exempt work.

The Department has retained this general rule as proposed.

The only modification intended in the proposed regulations was removing the restriction that exempt outside sales employees could not perform work unrelated to outside sales for more than 20-percent of the hours worked in a workweek by nonexempt

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[11] Although the statute refers to "salesman," the final rule, without objection from commenters, replaces this gender-specific term with "outside sales employees."

employees of the employer. This revision was proposed for consistency with the "primary duty" approach adopted for the other section 13(a)(1) exemptions. In addition, the current outside sales 20-percent restriction is particularly complicated and confusing since it relies on the work hours of nonexempt employees and requires tracking the time of employees who, by definition, spend much of their time away from the employer's place of business.

A large majority of the comments that address the outside sales exemption express support for the adoption of the "primary duty" test in lieu of the 20-percent rule. For example, the Society for Human Resource Management (SHRM) and Grocery Manufacturers of America (GMA) state that this revision would provide a more practical method for employers to determine whether an employee qualifies as an exempt outside sales employee. According to SHRM, in order to keep an account of the percentage of time that outside sales employees spend on exempt versus nonexempt tasks, as required under the 20-percent rule, employers essentially have to track the hours of their outside sales employees. SHRM notes that it is very difficult for employers to meet this responsibility given that outside sales employees spend large amounts of time away from their employers' regular places of business. GMA shares these concerns, stating that keeping track of an outside sales employee's individual activities to determine whether they are exempt, nonexempt or incidental to exempt sales activity is administratively difficult, if not impossible. The National Small Business Association comments that moving away from a percentage basis to the new definition of "primary duty" will alleviate

much of the administrative burden on small business owners.

Two law firms commenting on the outside sales exemption (Goldstein Demchak Baller Borgen & Dardarian and McInroy & Rigby) ask the Department to retain the current 20-percent limit on nonexempt work. Both firms express concern that the outside sales exemption would be subject to abuse by employers without a "bright-line" 20-percent test. In other words, employers might misclassify sales personnel as exempt under the outside sales exemption by merely requiring that they perform only minor amounts of outside sales work. A few commenters, such as the AFL-CIO, generally oppose removing the 20-percent limitation on nonexempt work for the same reasons discussed above in connection with the executive, administrative and professional exemptions.

After review of the relevant comments, the Department continues to believe that the application of the primary duty test to the outside sales exemption is preferable to the 20-percent tolerance test. As noted in several comments, the primary duty test is relatively simple, understandable and eliminates much of the confusion and uncertainty that are present under the existing rule. Cf. Ackerman v. Coca-Cola Enterprises, Inc., 179 F.3d 1260, 1267 (10th Cir. 1999) (citing existing § 541.505(a) to the effect that "'[a] determination of an employee's chief duty or primary function must be made in terms of the basic character of the job as a whole' and that "the time devoted to the various duties is an important, but not necessarily controlling, element' "), cert. denied, 528 U.S. 1145 (2000). It also avoids the necessity that employers

track the hours of its outside sales employees, which is consistent with the underlying rationale for exempting outside salespersons. Utilization of the primary duty concept also provides a consistent approach between the outside sales exemption and the exemptions for executive, administrative and professional employees. Finally, the Department is of the view that concerns relating to potential abuse under the new rule are addressed by the objective criteria and factors for determining an employee's primary duty that are contained in section 541.700.

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Section 541.503 Promotion Work

Under proposed section 541.503, "promotional work" is exempt outside sales work if it "is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations." However, "promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work." Proposed subsections 541.503(b) and 541.503(c) include examples to illustrate when promotional activities are exempt versus nonexempt work. To address commenter concerns discussed below, the Department has made minor changes to section 541.503(c).

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After reviewing the comments and current case law, the Department has made minor changes to section 541.503(c) to address commenter concerns that technological changes in how orders are taken and processed should not preclude the exemption for

employees whose primary duty is making sales. As indicated in the proposal, the Department does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services. An employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales. *See* 1940 Stein Report at 46 (outside sales exemption does not apply to an employee "who does not in some sense make a sale") (emphasis added). Extending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test. *See* 1940 Stein Report at 46 (outside sales exemption does not extend to employees "engaged in paving the way for salesmen, assisting retailers, and establishing sales displays, and so forth").

Nonetheless, the Department agrees that technological changes in how orders are taken and processed should not preclude the exemption for employees who in some sense make the sales. Employees have a primary duty of making sales if they "obtain a commitment to buy" from the customer and are credited with the sale. *See* 1949 Weiss Report at 83 ("In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities

are not exempt"). *See also Ackerman v. Coca-Cola Enterprises, Inc.*, 179 F.3d 1260, 1266-67 (10th Cir. 1999) (substantial merchandising responsibilities, including restocking of store shelves and setting up product displays, did not defeat outside sales exemption for soft drink advance sales reps and account managers where such responsibilities were "incidental to and in conjunction with" sales they consummated at stores they visited), *cert. denied*, 528 U.S. 1145 (2000); *Wirtz v. Keystone Readers Service, Inc.*, 418 F.2d 249, 261 (5th Cir. 1969) ("student salesmen" not exempt where engaged in promotional activities incidental to sales thereafter made by others).

Exempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button. The changes to proposed section 541.503(c) are intended to avoid such a result. Finally, the Department notes that outside sales employees may also qualify as exempt executive, administrative or professional employees if they meet the requirements for those exemptions. For example, an employee whose primary duty is promotion work such as advertising or marketing-not selling-may not meet the requirements for the "outside sales" exemption, but could be an exempt administrative employee.

No. 09-0437

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE NOVARTIS
WAGE AND HOUR LITIGATION

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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No. 09-0437

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the Plaintiffs-Appellants. The district court committed legal error when it concluded that the Plaintiffs-Appellants, Pharmaceutical Sales Representatives ("Reps") employed by Novartis Pharmaceutical Corporation ("NPC"), are exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA" or "Act") under the "outside sales" exemption or, alternatively, the "administrative" exemption. *See* 29 U.S.C. 213(a)(1).

STATEMENT OF INTEREST OF THE SECRETARY OF LABOR

The Secretary administers and enforces the FLSA, *see* 29 U.S.C. 204(a) and (b), 211(a), 216(c),

217, and has a compelling interest in ensuring that it is interpreted correctly. By concluding that the Reps are exempt as outside salespersons despite the fact that they do not engage in any sales, the district court failed to follow the Department of Labor's ("Department's") regulatory provisions limiting the exemption to employees who make sales or obtain orders or contracts for services for which a consideration will be paid by the client or customer. *See* 29 C.F.R. 541.500. Moreover, the court's conclusion that the Reps, who are given lists of physicians to visit and are not allowed to go beyond the messages crafted by NPC (as set out in scripts and related materials with which they are provided), are exempt administrative employees is inconsistent with the regulatory requirement that employees must exercise discretion and independent judgment with respect to matters of significance in order to qualify for the administrative exemption. *See* 29 C.F.R. 541.200(a)(3).

STATEMENT OF THE ISSUES

(1) Whether the district court erred by concluding that the Reps are exempt outside salespersons despite the fact that they do not "make sales" as required by the Department's "outside sales" regulations.

(2) Whether the district court erred by concluding that the Reps are exempt administrative employees in accordance with the Department's "administrative exemption" regulations, which limit the exemption to employees who exercise discretion and independent judgment with respect to matters of significance.

STATEMENT OF FACTS

The plaintiffs in this case are a class of over 2,500 Reps who worked for NPC in New York, California, and other states. The Food and Drug Administration ("FDA") prohibits Reps from selling drugs to physicians, *see In Re Novartis,* 593 F. Supp. 2d 637, 642 (S.D. N.Y. 2009); their primary duty is to call on physicians and provide them with information about NPC's drugs. *Id.* at 641. The goal of providing the physicians with this information is to convince them to prescribe NPC's drugs to their patients. Id.[7]

NPC trains the Reps in sales techniques as well as giving them basic training in pharmacology and other relevant subjects. *Id.* NPC expects the Reps to deliver a "core message" about the drugs to each physician, and provides them with scripts and other materials to help them do so. *Id.* They may not elaborate on the messages crafted by NPC, such as making claims about a drug's effectiveness, absent NPC authorization. *Id.* NPC also provides the Reps with materials to use in their presentations, such as pamphlets, clinical studies, and visuals aids, together with instructions on how these materials should be utilized; Reps may not use other materials unless NPC has cleared them. *Id.*[8] Within these

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[7] The patient does not purchase the prescribed drugs from a physician, but rather from a pharmacy. NPC sells its drugs directly to distributors, who in turn sell them to pharmacies, who then sell them to patients with prescriptions (Oral Argument Transcript, Nov. 18, 2008 at 5:9-10).

[8] If a Rep does not have a scripted response from NPC to a physician's concerns, she must try to "sidestep" the question by

stringent parameters, the Reps "tailor" their presentations to each physician based on such considerations as the amount of time the physician is willing to meet with the Rep, the physician's patient base and prescribing habits, and the physician's personality. *Id.* at 642. NPC also provides the Reps with a budget for organizing informational events for their target physicians, following NPC guidelines for speakers and invitees. *Id.*

Each Rep is assigned a target list of physicians to call on; Reps may not remove or add physicians to their list without NPC's consent, and are reprimanded for failing to adhere to their target lists (Plaintiffs-Appellants' Statement of Facts ("SOF") at ¶¶ 37-40). NPC also assigns the Reps specific drugs to promote. *In Re Novartis,* 593 F. Supp. 2d at 641. Although NPC does not directly supervise the Reps, it expects them to call on a certain number of physicians on their list between 8 a.m. and 5 p.m. each weekday, determines how often Reps should call on each physician, and ranks each physician and drug in order of importance for each Rep (Plaintiffs-Appellants SOF at ¶ 37). *Id.* at 642. NPC also expects the Reps to "close" each physician visit by requesting a non-binding commitment to prescribe NPC drugs to their patients when appropriate or, in other cases, giving a physician a clinical study to review or thanking the physician for his time. *Id.* The Reps earn an average annual "salary" of $91,500 that includes both base pay and "incentive

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restating the "core message" or refer the physician to medical experts and NPC (Plaintiffs-Appellants SOF at ¶¶ 77-78).

payments" based on the number of prescriptions written by physicians. *Id.*

SUMMARY OF ARGUMENT

Under the Department's regulations, the Reps do not meet the requirements for either the outside sales or administrative exemption. The Reps do not sell or take orders for NPC's drugs; rather, they provide information to target physicians about NPC's drugs with the goal of persuading the physicians to prescribe those drugs to their patients. The actual sale of drugs takes place between NPC and pharmacies. Although the Reps' duties bear some of the indicia of sales -- they use methods of persuasion similar to those of salespersons, they receive some of their compensation. in the form of bonus or incentive payments, and their promotion work affects NPC's actual drug sales -- the fact that the Reps do not actually "make sales" conclusively demonstrates that the position is not that of an outside salesperson consistent with the Department's legislative rules.

Furthermore, when promoting the drugs to the physicians, the Reps are not permitted to deviate from the "core message" found in the scripts, manuals, brochures, and other materials NPC provides them. If the Reps do not have a scripted response to a physician's question, they are required to either reiterate the "core message" or refer the physician to NPC's medical experts. These constraints on the Reps' primary duties demonstrate that, although the Reps have some discretion (such as deciding what time of day to see which physician, tailoring their message to a physician's personality

or time constraints, and deciding whether to ask for a non-binding commitment at the end of a visit), they do not exercise discretion and independent judgment with respect to matters of significance. Thus, the Reps do not qualify for the administrative exemption.

ARGUMENT

I. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE REPS ARE EXEMPT OUTSIDE SALESPERSONS DESPITE THE FACT THAT THEY DO NOT "MAKE SALES" AS REQUIRED BY THE DEPARTMENT'S "OUTSIDE SALES" REGULATIONS

Section 13(a)(1) of the FLSA provides a complete exemption from the overtime pay requirement for "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman[,] as such terms are defined and delimited from time to time by regulations of the Secretary[.]" 29 U.S.C. 213(a)(1). The Act's "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *see Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217, 222 (2d Cir. 2002).

Pursuant to Congress's express delegation of rulemaking authority, the Secretary issued revised regulations after notice and comment that "define and delimit" the FLSA's overtime exemptions. *See* 69

Fed. Reg. 22,122 (Apr. 23, 2004). As such, they are entitled to controlling deference. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984); *see also Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 165-68, 171-74 (2007); *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *United States v. Mead* Corp., 533 U.S. 218, 229-30 (2001).[9]

1. As noted *supra*, section 13(a)(1) of the FLSA provides an exemption from the statute's minimum wage and overtime requirements for "any employee employed . . . in the capacity of outside salesman." The Department's regulations define that phrase as including "any employee . . . whose primary duty is . . . making sales within the meaning of section 3(k) of the Act, or . . . obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer."

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[9] To the extent that the plain language of the Department's outside sales or administrative regulations are ambiguous, courts must give controlling deference to the Department's interpretation of its own regulations unless such interpretation is plainly erroneous or inconsistent with those regulations. *See Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1155 (2008); Auer v. *Robbins*, 519 U.S. 452, 461 (1997). This principle holds true whether the Secretary's interpretation is found in a Preamble to a final rule published in the Federal Register, an opinion letter or other interpretive materials, or in a legal brief. *See, e.g., Coke*, 551 U.S. at 171 (controlling deference to Department's Advisory Memorandum issued during the course of litigation); *Auer*, 519 U.S. at 462 (controlling deference to legal brief).

29 C.F.R. 541.500(a)(1)(i)-(ii).[10] "Primary duty" means "the principal, main, major, or most important duty that the employee performs," 29 C.F.R. 541.700, and section 3(k) of the FLSA defines "sale" as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. 203(k); *see* 29 C.F.R. 541.501.[11] The Department's regulations further explain that "[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property," and that "services" "extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order." 29 C.F.R. 541.501(b) and (d).

The regulations also explain the relationship between promotional work and the outside sales exemption, clarifying that

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[10] It is clear that the Reps are "customarily and regularly engaged away from" NPC's place of business. 29 C.F.R. 541.500(a)(2).

[11] Contrary to the conclusions of two recent district court decisions, the Reps' activities do not come within the "other disposition" language found in section 3(k). *See Schaefer-LaRose v. Eli Lilly & Co.*, S.D. Ind. No. 07-1133 (Sept. 29, 2009); *Delgado v. Ortho-McNeil, Inc.*, 2009 WL 2781525 (C.D. Cal. Feb. 6, 2009). The term "other disposition" must be read in the context of the language that precedes it, i.e., in the context of making some kind of a sale. The most the Reps can obtain is a non-binding commitment from a physician to prescribe NPC drugs as appropriate.

> [p]romotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

29 C.F.R. 541.503(a). In other words, "[p]romotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work." 29 C.F.R. at 541.503(b).

Thus, under the plain language of the Department's regulations, the Reps do not meet the primary duties test for the outside sales exemption.[12] Because the Reps do not sell any drugs or obtain any orders for drugs, and can at most obtain from the physicians a non-binding commitment to prescribe NPC's drugs to their patients when appropriate, the

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[12] "A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations." 29 C.F.R. 541.2. Therefore, contrary to the district court's suggestion in *In Re Novartis*, 593 F. Supp. 2d at 654 n.7., the fact that NPC "hired, trained, paid, and incentivized [the Reps] as sales personnel" is not in any way dispositive.

Reps do not meet the regulation's plain and unmistakable requirement that their primary duty must be "making sales." 29 C.F.R. 541.500(a)(1)(i). Contrary to the district court's assertion that "Reps make sales in the sense that sales are made" in the pharmaceutical industry, *In Re Novartis*, 593 F. Supp. 2d at 650, the actual sale of NPC's drugs occurs between the company and distributors (and then to the pharmacy).[13] Insofar as the Reps' work increases NPC's sales, it is non-exempt promotional work "designed to stimulate sales that will be made by someone else." 29 C.F.R. 541.503(b).

2. To the extent, however, that there is any ambiguity on this point in the Department's regulations, the Department's Wage and Hour Division has consistently reiterated its position that a "sale" for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought.[14] For example, Wage and Hour

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[13] Even if it is true that absent a prescription no drugs would be sold to patients, *see In Re Novartis*, 593 F. Supp. 2d at 650, it nonetheless is "irrelevant to the dispositive inquiry of whether [Reps] make sales of those products as defined in the FLSA.". *Kuzinski, et al. v. Schering Corp.*, 604 F. Supp. 2d 385, 398 (D. Conn. 2009) (internal quotation marks omitted).

[14] In the context of addressing the "retail or service establishment" criteria of the FLSA's section 7(i) exemption, *see* 29 U.S.C. 207(i), Wage and Hour noted when discussing the definition of "sale" in section 3(k) of the FLSA that "[t]hough the term sale does not always have a fixed or invariable meaning, it is generally held to be a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or

rejected the application of the outside sales exemption to individuals soliciting charitable contributions, noting that "[s]oliciting promises of future charitable donations or 'selling the concept' of donating to a charity does not constitute 'sales' for purposes of the outside sales exemption. . . . [These] solicitors do not obtain orders or contracts for services or for use of your client's facilities for which a consideration will be paid." WH Opinion Letter FLSA 2006-16, 2006 WL 1698305; see WH Opinion Letter August 19, 1994, 1994 WL 1004855 (concluding that soliciting organ and tissue donors by selling the concept of being a donor does not constitute "sales" under the regulations). Further, Wage and Hour's Field Operations Handbook ("FOH") states that "[an employee whose duty is to convince a dealer of the value of his employer's service to the dealer's customers and who does not in fact obtain firm orders or contracts from either the dealer or his customers is not making sales within the meaning of FLSA Sec. 3(k)." FOH § 22e04 (1965).

3. This Court has not addressed the question whether Reps are exempt as outside salespersons.[15]

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sold." WH Opinion Letter FLSA 2005-06, 2005 WL 330605 (citing *Wirtz v. Charleston Coca-Cola Bottling Company, Inc.*, 237 F. Supp. 857 (E.D.S.C. 1965)) (internal quotation marks omitted).

[15] No circuit court has addressed this specific question. There are, however, cases involving the application of the outside sales and administrative exemptions pending in the Third and Ninth Circuits. In *Smith* v. *Johnson & Johnson*, No. 09-1223, now before the Third Circuit on appeal, the district court

Within the Second Circuit, the district courts that have addressed the question have, with the exception of the decision in the instant case, concluded that the outside sales exemption does not apply to Reps because they do not make sales as required by the Department's regulations. *See Kuzinski*, 604 F. Supp. 2d at 403 ("Because [the Reps] undisputedly do not sell or make any sales as those terms are defined in the FLSA and its implementing regulations, they fall outside the FLSA's outside sales exemption.") (internal quotation marks omitted); *Ruggeri v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 585 F. Supp. 2d 254, 272 (D. Conn. 2008) ("Because [the pharmaceutical company] has not shown that [the Reps] make sales or obtain contracts or orders, the outside sales exemption is inapplicable."); *Amendola v. Bristol- Myers Squibb Co.*, 558 F. Supp. 2d 459, 470 (S.D.N.Y. 2008) ("As a starting point, the interpretation of the [FLSA outside sales] exemption

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determined that the outside sales exemption does not apply to Reps because they do not "make sales," but that they are exempt administrative employees who exercise discretion as to matters of significance. *See Smith v. Johnson & Johnson*, 2008 WL 5427802, at *11-12 (D. N.J. Dec. 30, 2008). Currently before the Ninth Circuit are two cases in which the Central District of California concluded that Reps are exempt as outside salespersons. *See Yacoubian v. Ortho-McNeil Pharmaceutical Corp.*, Ninth Cir. No. 09-55225 (No. 07-127, C.D. Cal. Feb. 6, 2009); *Delgado v. Ortho-McNeil Primary Care, Inc.*, Ninth Cir. No. 09-55229 (No. 07-263, C.D. Cal. Feb. 6, 2009); *cf. D'Este v. Bayer Corp.*, 565 F.3d 1119 (9th Cir. 2009) (certifying to California Supreme Court the question whether the Central District of California correctly concluded that Reps are exempt outside salespersons under California state law; the district court's decisions relied in part on its interpretation of the FLSA's requirements).

rests on the plain meaning of the statutory and regulatory texts that define it.").

The district court here relied upon this Court's statement in an FLSA "salary basis" case that "[g]iven the broad scope of the FLSA and its implementing regulations, [the Department's] regulations provide only general guidance to accommodate the varying needs of employers and employees in a diverse and varied national economy," *see Havey v. Homebound Mortgage, Inc.*, 547 F.3d 158, 163 (2d Cir. 2008), for its conclusion that it could "take[] into account the characteristics of the industry in question when determining the applicability of the outside sales exemption." *In Re Novartis*, 583 F. Supp. 2d at 649. As noted by the district court in *Kuzinski*, however, "that observation . . . does not mean that an exemption to an employer's obligation to pay overtime under the FLSA can apply more broadly than the regulations specify." 604 F. Supp. 2d at 397 (internal quotation marks omitted).[16] "The conclusion that [Reps] fall within the outside sales exemption from FLSA's overtime provisions on the basis of the characteristics of the industry in question . . . notwithstanding [the Reps'] lack of capacity to sell, and physicians' lack of capacity to purchase" is an

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[16] This Court, despite referring to the "general guidance" provided by the regulations, did not ignore what the regulations plainly and specifically prescribe. *See Havey*, 547 F.3d at 163-64 ("[T]he regulations specify that a salaried employee must be paid a fixed and predetermined amount . . . but do not prescribe when or how frequently this fixed element of compensation may be determined . . . .").

attempt at "back-fitting . . . the FLSA to industry practices." *Id.* at 399 (internal quotation marks omitted); *see Ruggeri*, 585 F. Supp. 2d at 267 ("The justification for the pharmaceutical industry's use of [Reps] and direction of their efforts at physicians based on the artifact of medical and drug regulation . . . does not provide justification for applying the outside sales exemption to [the Reps], especially given that FLSA exemptions apply only to those employees who are plainly and unmistakably within them.") (internal quotation marks omitted).

As noted by the Tenth Circuit, "[t]he touchstone for making a sale, under the [Department's regulations], is obtaining a commitment." *Clements v. Serco*, 530 F.3d 1224, 1227 (2008) (concluding that civilian military recruiters are not within the outside salesperson exemption even though they "engaged in sales training and 'sold' the idea of joining the Army to potential recruits," because they did not engage in sales work as defined by the Department's regulations). In a similar situation to that presented here, the district court in *Kuzinski* concluded:

> [T]he closest that [Reps] come to consummating "sales" is increasing the overall demand for its products, such that [other company] employees negotiate and commit to contracts with wholesalers -- not the physicians to whom [the company's] products are promoted. An employee does not consummate a "sale" for purposes of the FLSA merely by "lay[ing] the groundwork" for another employee to obtain a customer's commitment. ... . To the extent [the Reps] lay foundation or groundwork, it is to increase or

> maintain their employer's market share for the products they promote. In this sense they pave the way for sales but in no more direct a manner as a pharmaceutical company's direct-to-consumer advertising, which raises demand for that company's products. Neither of these activities constitutes "sales" under the FLSA.

604 F. Supp. 2d at 399 (citing *Clements*, 530 F.3d at 1229).

4. The cases cited by the district court as support for its conclusion that the Reps "make sales" are inapposite. In *Gregory v. First Title of America, Inc.*, 555 F.3d 1300, 1308-10 (2009), the Eleventh Circuit concluded that a "Marketing. Director" was an exempt outside salesperson because she obtained orders for title insurance services. In contrast to the instant case, there was no "evidence of any other intervening sales effort between [the Marketing Director] and orders placed with [her employer]"; once she obtained the order for title insurance services, the sale was complete. *Id.* at 1309. The First Circuit case cited by the district court, *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 47 (2008), *cert. denied*, 129 S.Ct. 2864 (2009), involved the question whether Reps (which that court referred to as "detailers") were entitled to access to "patient-identifiable and prescriber-identifiable data" about prescriptions written in New Hampshire. Although the First Circuit referred to the Reps effect in increasing the pharmaceutical companies' market share, the question of pharmaceutical sales, in relation to the FLSA or any other law, was not before it. Similarly, although the district court in *Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085 (D.

Minn. 1981), *aff'd,* 684 F.2d 565 (8th Cir. 1982), described the employees of cardiac pacemaker manufacturers who promoted the pacemakers to physicians as "sales representatives" and their work in terms of "sales," the issue implicated in that case was a covenant not to compete, not the FLSA's outside sales exemption. *Id.* at 109495. The court was interpreting the term "customer" under applicable contract construction (*i.e.*, the customers with whom Gibbons had contact in the year immediately preceding his employment with the employer), not the term "sale" under the FLSA or, more specifically, what is required before an employer may avail itself of the outside sales exemption.

II. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE REPS ARE EXEMPT ADMINISTRATIVE EMPLOYEES IN ACCORDANCE WITH THE DEPARTMENT'S "ADMINISTRATIVE EXEMPTION" REGULATIONS, WHICH LIMIT THE EXEMPTION TO EMPLOYEES WHO EXERCISE DISCRETION AND INDEPENDENT JUDGMENT WITH RESPECT TO MATTERS OF SIGNIFICANCE

1. The employer failed to show that the Reps exercise discretion and independent judgment with respect to matters of significance. Under the Department's administrative exemption regulations, an "employee employed in a bona fide administrative, capacity" means "any employee . . . whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the

employer or the employer's customers . . . [and] . . . [w]hose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. 541.200(a)(2)-(3).[17] The requirement that the employee's primary duty include the exercise of discretion and independent judgment "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed." 29 C.F.R. 541.202(a). Furthermore, the phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation, with the following factors to be considered:

> whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the

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[17] In order to fall within the administrative exemption, the employee must also meet the salary requirement of $455 per week. *See* 29 C.F.R. 541.200(a)(1). The salary requirement is not at issue in this case. Further, because the Reps do not satisfy the "discretion and independent judgment with respect to matters of significance" prong of the administrative exemption, this brief does not address whether the Reps' "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. 541.200(a)(2) and (3).

> business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. 541.202(b).[18] Although this list is not exhaustive, it indicates the kind of activities that constitute "matters of significance."

Moreover, the exercise of discretion and independent judgment must be more than the use of skill in applying well- established techniques,

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[18] As the Preamble to the final rule, 69 Fed. Reg. 22,143 (Apr. 23, 2004), explained, federal courts generally find that employees who meet at least two or three of the indicators mentioned in 29 C.F.R. 541.202(b) are deemed to be exercising discretion and independent judgment with respect to matters of significance, although a case-by-case analysis is required.

procedures, or specific standards described in manuals or other sources. *See* 29 C.F.R. 541.202(e); *see also* 541.203(g)-(i) (clarifying through examples of exempt and non-exempt administrative employees that reliance on techniques and skills developed through specialized training and use of manuals is insufficient for application of the exemption). The regulations also clarify that "[a]n employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses, if the employee fails to perform the job properly." 29 C.F.R. 541.202(f).

2. Wage and Hour has consistently reiterated that both the nature and level of the employee's decisions as they relate to the employer's business operations determine whether the employee exercises discretion and independent judgment with respect to matters of significance. "In this regard, it is not sufficient that an employee makes decisions regarding when and where to do different tasks, as well as the manner in which to perform them." WH Opinion Letter FLSA 2006-45, 2006 WL 3930478 (copy editors do not exercise discretion as to matters of significance even though they "organize work priorities to meet production deadlines set by management [and] make decisions on workflow within their areas and communicate these decisions to club copywriters") (citing *Clark v. J.M. Benson Co.*, 789 F.2d 282, 287 (4th Cir. 1986)) (internal quotation marks omitted). Another Wage and Hour opinion letter from 2006, denying the application of the administrative exemption to legal analysts, provides a helpful analogous example:

> Although you state that you work independently and use your own judgment as to how to prioritize your work assignments, including how the projects will be executed and how much time to spend on each assignment, it is not sufficient that an employee makes decisions regarding relatively insignificant matters . . . Nor is it sufficient that an employee makes limited decisions, within clearly "prescribed parameters." *See Dalheim v. KDFW-TV,* 706 F. Supp. 493, 509 (N.D. Tex. 1998), *aff'd,* 918 F.2d 1220 (5th Cir. 1990). Rather, there must be the exercise of discretion and independent judgment on matters of significance or consequence related to the management or general business operations of the employer or the employer's customers. For instance . . . you do not formulate or implement management policies, utilize authority to waive or deviate from established policies, provide expert advice, or plan business objectives in accordance with the dictates of § 541.202(b).

WH Opinion Letter FLSA 2006-27, 2006 WL 2792441.[19]

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[19] Wage and Hours' opinion letter on legal analysts also demonstrates that regulatory or legal limitations on an employee's exercise of discretion are, in fact, limitations that may preclude application of the administrative exemption: "In addition, most jurisdictions have strict prohibitions against the unauthorized practice of, law by laypersons. . . . The implication of such strictures is that paralegal employees would not have the amount of authority to exercise independent judgments with regard to legal matters necessary to bring them within the

Much like the legal analysts, Reps work independently (i.e., without direct supervision), determine what time of day to visit the physicians on their lists, and decide how best to execute their presentations within clearly prescribed parameters. This, however, similarly does not suffice to qualify for the administrative exemption; the Reps do not perform any primary duties that are largely comparable to those found in 29 C.F.R. 541.202(b), such as formulating or implementing management policies, utilizing authority to deviate from established policies, providing expert advice, or planning business objectives.[20] *Compare* WH Opinion

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administrative exemption." WH Opinion Letter FLSA 2006-27. Similarly, there are legal constraints placed on the Reps. "Since the Reps are advocating products which are routinely and closely regulated by the Food and Drug Administration (FDA), NPC prepares scripts and related materials which the Reps are expected to use to deliver a 'core message' about NPC products to each physician they visit; Reps may not go beyond the boundaries of the messages crafted by NPC." *In Re Novartis* 593 F. Supp. 2d at 641.

[20] The cases set out in the Preamble to the 2004 Part 541 regulations to support the factors listed in 29 CF.R. 541.202(b) clearly refer to the kind of work not engaged in by the Reps here -- making recommendations to management on policies and procedures; conducting independent investigation and resolution of issues without prior approval; having authority to waive or deviate from established policies and procedures without prior approval; developing guidebooks, manuals, and other policies and procedures for the employer or the employer's customers; negotiating on behalf of the employer with some degree of settlement authority; having authority to commit

Letter FLSA 2006-34, 2006 WL 3227789 (applying administrative exemption to community events supervisors because their authority to negotiate and bind their employers on significant matters such as negotiating contracts with vendors was sufficient to demonstrate discretion and independent judgment with respect to matters of significance); WH Opinion Letter FLSA 2006-46, 2006 WL 3930479 (location managers' primary duties, such as creating and enforcing regulations for the production crew, committing the employer in financial matters, and negotiating site rentals, included the exercise of discretion and independent judgment as to matters of significance).

3. No circuit court has addressed whether Reps are exempt administrative employees. Besides the instant case, one district court within the Second Circuit, relied upon by the district court in *In Re Novartis,* 593 F. Supp. 2d at 656-58, has concluded that the "discretion and independent judgment with respect to matters of significance" test for the administrative exemption "likely" applies to Reps because their daily decisions (which are similar to those in this case) "seek to influence prescription writing practices -- a matter of great consequence to [their employer's] business" -- and their "exercises of judgment [are] ways to drive the business [and] move market share," and because "if the doctor didn't like [the Rep], then the doctor was not going to prescribe the drug." *Amendola,* 558 F. Supp. 2d at 477. At

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employer in matters that have financial impact. *See* 69 Fed. Reg. 22,143-144 (April 23, 2004).

issue in *Amendola,* however, was the plaintiff Rep's motion for discovery of the names and addresses of the pharmaceutical company's Reps, authorization for notice of the collective action to be sent to those potential plaintiffs, and equitable tolling of any claims they may file. *See* 558 F. Supp. 2d at 462. As such, the district court looked only at the "likelihood" that the pharmaceutical company would successfully argue the application of the administrative exemption to the Reps when deciding whether to grant the plaintiff's motion. *Id.* at 477.

Furthermore, the district court in *Amendola* relied in part on a 1945 Wage and Hour opinion letter which concluded that drug companies' "medical detailists" were administratively exempt. Those medical detailists, though, "were consulted with respect to individual nutritional problems encountered by hospitals and physicians, such as determining whether the use of subject's product was related to the occurrence of an epidemic," and "work[ed] virtually without supervision." *Ruggeri,* 585 F. Supp. 2d at 276 (internal quotation marks omitted). In addition, the court's analysis appears to have misunderstood the "matters of significance" requirement. In commenting on "driving the business" and "market share," it blurred the distinction between an employee who exercises discretion and independent judgment related to matters of significance and one whose skillful job performance necessarily has some impact on her employer's bottom line (something undoubtedly

important to the company).[21] *See, e.g., Robinson-Smith v. Government Employees Insurance Co.*, 323 F. Supp. 2d 12, 25 (D. D.C. 2004) (noting, in the course of concluding that auto damage adjusters, who assess, negotiate, and settle automobile damage claims, travel to and from inspection sites, inspect vehicles for damage, and write estimates for repairs were not exempt, that "'the use of skill is to be clearly distinguished from work requiring discretion

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[21] In addition to the decision in *Amendola*, the district court in the instant case relied heavily on another district court case, *Cote* v. *Burroughs Wellcome Co.*, 558 F. Supp. 883 (E.D. Pa. 1982), as persuasive authority for concluding that the Reps are exempt administrative employees. In *Cote*, the court concluded that a Rep exercised sufficient discretion for the administrative exemption to apply because, even though she worked within a tightly-controlled marketing environment, the Rep could tailor her presentation to individual doctors in terms of her manner and the frequency of her visits and could "cultivat[e] a good working relationship with the nurses at a particular clinic and asking for their help in reminding physicians about the drug." 558 F. Supp. at 887. As a threshold matter, contrary to the district court's reasoning in *Ruggeri*, 585 F. Supp. 2d at 276, the fact that *Cote* was decided under the "old" Part 541 regulations does not vitiate its reasoning. *See* 69 Fed. Reg. 22,143 (April 23, 2004) (making the phrase "matters of significance" part of the regulatory test for the administrative exemption instead of having it as part of the Department's interpretive guidance). Nevertheless, the analysis in *Cote* fails for all the reasons set out *supra*. "Tailoring" one's strictly circumscribed presentations and establishing good personal working relationships do not equate to primarily performing duties requiring the exercise of discretion and independent judgment concerning matters of significance. Of course, as district court decisions, neither *Amendola* nor *Cote* is controlling vis-à-vis this Court. *See Lombard v. Whitman*, 485 F.3d 73, 83 (2d Cir. 2007) (distinguishing between own precedent and district court decisions).

and independent judgment'") (quoting *Reich v. American Int'l Adjustment Co.*, 902 F. Supp. 321, 324 (D. Conn. 1994)). As noted by the Department's regulations, an employee does not exercise discretion and independent judgment related to matters of significance merely because his success (or lack thereof) in performing his duties has a financial impact on his employer's business. *See* 29 C.F.R. 541.202(f); *see also Ruggeri*, 585 F. Supp. 2d at 276 n.13 (when denying summary judgment to pharmaceutical company on the question of whether its Reps were exempt administrative employees, the court rejected the argument that the exemption applied because of Reps' impact on company's financial success). Indeed, if the "matters of significance" standard were interpreted to include any actions that in some manner "move market share" or "drive the business," it would potentially broaden the exemption to include the host of employees whose successful performance of their duties contributes in some way to the success of the company; such an interpretation would effectively swallow the "rule" requiring the payment of the minimum wage and overtime compensation under the FLSA.[22]

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[22] It is worth noting that the district court in *In Re Novartis* did not rely upon the First Circuit's decision in *Reich v. John Alden Life Insurance Company*, 126 F.3d 1, 9 (1st Cir. 1997), to show that the Reps exercised discretion and independent judgment concerning matters of significance; rather, it used *Alden* to show that the Reps performed office or non-manual work directly related to management or general business operations. *See* 593 F. Supp. 2d at 655-58. In any event, the decision in *Alden* can be distinguished on its facts. In *Alden*, marketing

4. In sum, as with the outside sales exemption, the district court's administrative exemption ruling in this case is unpersuasive in its attempt to "back-fit" the FLSA regulations into the pharmaceutical industry's practices. The facts are clear that, within the stringent restrictions on Reps' work activities, the Reps' discretion is limited to such matters as what time of day to visit a particular doctor, the manner in which to approach the doctor based on the doctor's personality, and how best to deliver (i.e., to "fit in") the NPC's "core message" for a particular drug given the time constraints of a visit. To the extent that the Department's administrative exemption regulations instruct that "[t]he phrase

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representatives working for a company that designed, created, and sold insurance products (primarily for businesses that were purchasing group coverage for their employees) did not sell through direct contacts with the ultimate consumers but, rather, relied upon licensed independent insurance agents to make sales of the employer's financial products. The marketing representatives were responsible for maintaining contact with hundreds of these independent sales agents to keep them apprised of the employer's financial products, inform them of changes in prices, and discuss how the product might fit their customer's needs (they would also inform the employer of what they learned from these agents, e.g., regarding a competitor's products or pricing). The First Circuit concluded that these marketing representatives were administratively exempt. Significantly, however, the First Circuit, in concluding that the discretion and independent judgment prong was met, noted that the marketing representatives "do not use prepared scripts or read from a required verbatim statement, nor do they operate within the contours of a prescribed technique or 'sales pitch.'" *John Alden Life Ins. Co.*, 126 F.3d at 14. By contrast, the Reps in the instant case are provided with scripts, which they are required to use, to help them deliver the requisite "core message." *In Re Novartis*, 593 F. Supp. 2d at 641.

'discretion and independent judgment' must be applied in the light of all the facts involved in the particular employment situation in which the question arises," *see* 29 C.F.R. 541.202(b), this guidance does not extend to ignoring the clear parameters and requirements of the regulations. *See, e.g., Kuzinski,* 604 F. Supp. 2d at 397-99. The Seventh Circuit's decision in *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 374-75 (2005), although analyzing the pre-2004 regulations, provides a useful comparison of what constitutes the exercise of discretion related to matters of significance within a highly regulated industry. In *Kennedy,* the Seventh Circuit concluded that, despite the heavily regulated nature of the nuclear power industry, work planners whose "job is to come up with a set of instructions that will remedy reported problems around the plant" were exempt. Even though the planners "look to past work packages for guidance and use a computer to aid their recommendations . . . [when] [f]aced with novel or not-so-novel problems, judges and Work Planners must use their independent judgment to determine how best to respond." *Id.* The work planners, although heavily regulated, thus had the discretion to develop new ways to resolve issues. The NPC Reps, on the other hand, do not have such discretion; NPC provides them with specific instructions for each aspect of their job, including scripted responses for physician concerns, from which NPC does not permit them to deviate. They therefore should not be deemed to exercise discretion and independent judgment regarding matters of significance.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision.

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IN THE

Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,

Petitioner,

v.

SIMONA M. LOPES, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUMMARY

The Fair Labor Standards Act ("FLSA") entitles employees to time-and-a-half overtime wages for all hours they work above forty per week. Certain categories of employees, however, need not be paid overtime premiums. Under Section 13(a)(1) of the Act, "any employee employed in a bona fide **administrative** capacity...or in the capacity of **outside salesman**" is exempt from overtime compensation. 29 U.S.C. § 213(a)(1).

Respondents are Sales Representatives ("Reps") employed by Petitioner Novartis Pharmaceuticals Corporation ("Novartis"). A Rep's primary duty is to visit (or "detail") physicians – typically for five minutes or less – and announce a pre-scripted message drafted by Novartis describing the Company's drugs in the hope that the doctors will later write prescriptions for those drugs. Novartis tightly micromanages the Reps' detailing activities. The Court of Appeals for the Second Circuit held that neither the "administrative" nor the "outside sales" exemptions cover the Novartis Reps. In so ruling, the Second Circuit gave controlling deference under *Auer v. Robbins*, 519 U.S. 452 (1997), to a Department of Labor ("DOL") *amicus* brief supporting the Reps' position that they are not exempt from overtime pay under the DOL's regulations.

Novartis's petition for *certiorari* should be denied. The decision of the Court of Appeals and the DOL brief on which the Court relied applied settled and straightforward regulatory standards to the specific facts of this case. Further, the decision addresses only

one of the two prongs of the administrative exemption, does not create a circuit split as to any legal rule, and upsets no legitimate, settled expectations of Novartis or any other employer. Because the decision below is fact-specific, narrow, and will produce no wide-ranging consequences, *certiorari* is unjustified.

The administrative exemption governs an employee who satisfies two prerequisites: his "primary duty" must (1) be "directly related to [his employer's] management or general business operations . . . and [(2)] include[] the exercise of discretion and independent judgment on matters of significance." 29 C.F.R. § 541.200(a). Bypassing the first element, the Circuit Court decided that the Reps were non-exempt under the second prong — they do not exercise sufficient "discretion and independent judgment." Novartis disagrees. But the extent to which Respondents exercise discretion and judgment is a fact-bound question that the Second Circuit answered based on a 2,900-page summary judgment record. This Court is not the forum for *de novo* review of the Second Circuit's application of settled law to those facts.

Nor is there a circuit split regarding the administrative exemption which might merit *certiorari*. All circuits concur that an employee must exercise a **high level** of discretion and independent judgment to qualify as an exempt administrator. Contrary to Novartis's Petition and its *amici*'s arguments, "minimal" or "some" discretion does not and has never sufficed. The *two* instances in which a court of appeals and the DOL — in a 1945 Opinion Letter — ruled that Pharmaceutical Reps fell under the administrative

exemption involved facts unlike those presented here. The Reps in those cases did not work for Novartis and enjoyed far more job freedom than do the Respondents.

The Second Circuit's application of the administrative exemption to the facts below is further unfit for review because the Court adjudicated only the exemption's "discretion and independent judgment" prong and did not consider whether the Reps' primary duty was "directly related" to Novartis's "management and general business operations." Even were this Court to grant *certiorari* and reverse on discretion and independent judgment, it would not thereby dispose of the entire appeal. This Court would still need to remand for the Second Circuit to review the trial court's ruling as to the "directly related" prong. This procedural muddle argues against granting *certiorari* on the administrative exemption.

The Court should also reject *certiorari* as to the Second Circuit's ruling that Novartis's Reps are not exempt from overtime as "outside salespersons." There is nothing new or surprising about the conclusion that Reps who promote but don't sell drugs are not "outside salespersons." No circuit court has ruled otherwise. The Second Circuit's understanding of the outside sales exemption is consistent with seventy years of FLSA regulations and precedent. And the DOL has never taken the position that pharmaceutical reps are excluded from overtime pay under the outside sales exemption. Moreover, in different contexts such as product liability suits, Novartis (along with other Pharma giants) has contended that its Reps **do not sell drugs**.

Applying *Auer v. Robbins*, the Second Circuit gave "controlling deference" to the DOL's *amicus* brief which argued that, given their job duties, the Respondent-Reps are not exempt administrators or outside salespersons. Under *Auer*, the Second Circuit concluded that the DOL's interpretation of its own regulations regarding the administrative and outside sales exemptions was not plainly erroneous. Novartis asks this Court to grant *certiorari* to "clarify" *Auer*'s holding.

Auer needs no clarification. The case is routinely applied in virtually every federal jurisdiction. The circuit courts are neither split nor confused about *Auer*. Novartis claims that *Auer* deference is out of place here because the DOL's *amicus* brief reflected a change in the agency's prior position. This is untrue. The DOL never has and never could issue a blanket overtime wage exemption for employees with the title of "Pharmaceutical Sales Representative." Job *duties*, not titles, control every exemption determination.[1] A solitary 1945 DOL Opinion Letter dealing with "medical detailists" — whose duties differed radically from those of Novartis's 21st century Reps — did not establish a DOL policy perpetually exempting Reps from overtime pay. The Court should decline the invitation by Novartis and its *amici* to muddy *Auer*'s clear rule of deference.

Novartis's appeals to policy are similarly baseless. Petitioner vastly exaggerates the impact of this decision on the pharmaceutical industry. This case involves *one* company — Novartis — that micromanages its Reps and gives them far less discretion than is typical in the industry. Reps at other drug companies who enjoy more

1. 29 C.F.R. § 541.2.

job freedom might well qualify for the administrative exemption. Novartis Reps perform standardized duties and are thus precisely the kind of employees that the overtime pay provisions of the FLSA are designed to protect. This case does not deserve *certiorari*.

STATUTORY AND REGULATORY BACKGROUND

A. The FLSA's Overtime Requirements

Section 7 of the FLSA, enacted in 1938, dictates that "no employer shall employ any of his employees...for a workweek longer than forty hours...unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one-and-one-half times the regular rate at which he is employed." (29 U.S.C. § 207).

The FLSA is designed to ensure that each employee covered by the Act receives not only a "fair day's pay for a fair day's work", but – as importantly – is protected from **"the evil of overwork as well as underpay."** *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 578 (1942), *quoting* 81 Cong.Rec. 4983 (1937) (message of President Roosevelt).[2] Because the FLSA aims to combat overwork as well as underpay, even well-compensated employees are entitled to overtime wages if their job duties do not satisfy an overtime exemption. "Employees are not to be deprived of the benefits of the Act simply because they are well paid...." *Jewell Ridge Coal Corp. v. United Mineworkers of America*,

2. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (the FLSA's legislative purpose was "to protect workers...from the evil of 'overwork' as well as 'underpay'").

325 U.S. 161, 167 (1945). *Jewell Ridge's* pronouncement is more than a platitude. In certain circumstances, workers earning more than $100,000 annually must be paid overtime wages.[3]

B. The FLSA's Exemptions from Overtime Pay

Section 213(a)(1) of the Act exempts from the overtime wage requirement "any employee employed in a bona fide...administrative...capacity [the administrative exemption] or in the capacity of outside salesman [the outside sales exemption] (as such terms are defined and delimited from time to time by the regulations of the Secretary [of Labor])." *Id.* § 213(a)(1).

The overtime exemptions are affirmative defenses as to which the employer bears the burden of proof. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). And because the FLSA is a remedial statute, exemptions from overtime pay must be narrowly construed against the employer, *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945). Congress delegated to the Department of Labor the authority to "define" and "delimit" the scope of the exemptions. Given this delegation, the exemption regulations and the DOL's reasonable constructions thereof "are legally binding." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 164 (2007); *see Auer*, 519 U.S. at 461.

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3. 29 C.F.R. § 541.601(b)(3) ("Highly Compensated Employee" exemption). See *Mohorn v. T.V.A.*, 2007 WL 2077549 (E.D. Tenn. July 17, 2007) (supervisors who earned more than $100,000 per year were not exempt because employer failed to meet its "heavy burden" of showing that an overtime exemption applied.).

C. The Administrative Exemption Regulations

The DOL's regulations define the statutory term "employee employed in a bona fide administrative capacity" to mean, in relevant part, an employee "whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer" (prong one), and "whose primary duty includes the exercise of *discretion and judgment* with respect to matters of *significance*" (prong two). 29 C.F.R. § 541.200(a) (emphasis added). The first prong was not addressed by the Second Circuit below.

As to the second prong, the regulations caution that "the phrase 'discretion and independent judgment' must be applied in light of all the facts involved in the particular employment situation in which the question arises." *Id.* § 541.202(b). Ten factual considerations are listed to aid in this determination.[4]

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4. These are:

> whether the employee has the authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree...; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies ... without prior approval; whether the employee has authority to negotiate and bind the

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The DOL's longstanding and consistent position has been that "[a] **high level** of discretion and independent judgment are necessary to qualify for [the administrative] exemption." Wage and Hour Opinion Letter, 1997 DOLWH LEXIS 30, at *6 (DOL July 23, 1997) ("[T]he exercise of discretion and independent judgment must be more than the use of skill in applying well established techniques, procedures or specific standards described in manuals or other sources."). *Id.* § 541.202(e). *See also* Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor, *Report and Recommendations on Proposed Revisions of Regulations*, pt. 541, at 63 (June 30, 1949) ("1949 Weiss Report"),[5] ("An employee performing routine clerical duties" is not administratively exempt, "even though he may exercise *some* measure of discretion and judgment as to the manner in which he performs his clerical tasks.") (emphasis added). This position is supported by

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> company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. § 541.202(b).

5. The Department of Labor held hearings on overtime exemptions and produced the 1940 Stein Report and the 1949 Weiss Report, both of which explain several overtime exemptions. *See* 69 Fed. Reg. at 22,124.

inescapable common sense. Every job involves at least "some" or "minimal" discretion. It would have been pointless to insert into the administrative exemption a discretion and independent judgment requirement if the exemption did not mandate more than "some" or "minimal" job discretion.

In the 2004 preamble to the current version of the administrative exemption, the DOL explained that the "discretion and independent judgment" aspect of the rule "is not a change in the current law" and was intended to reaffirm the settled requirements that "the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence." 69 Fed. Reg. 22,142, 22,143 (2004).

Courts have agreed with the DOL that – contrary to Novartis and its supporting *amici* – an employee who exercises only "some" or "minimal" discretion is not an overtime-exempt administrator. *See, e.g., Heidtman v. County of El Paso*, 171 F.3d 1038, 1042 (5th Cir. 1995) (affirming jury verdict that local tourism promoters were not covered by administrative exemption where they followed scripts and their duties were mechanical and repetitive); *Clark v. J.M. Benson Co., Inc.*, 789 F.2d 282, 287-88 (4th Cir. 1986) (noting that employee does not use the requisite discretion or independent judgment if he merely decides when, where or how to do assigned tasks); *Grandits v. United States*, 66 Fed. Cl. 519, 543 (2005) (finding that duties of GS-13 Import Specialist for U.S. Customs Service "requir[ed] knowledge and skill in the application of Customs statutes, regulations and schedules, but le[ft] little room for the level of

discretion and independent judgment necessary for exemption"); *Brock v. Nat'l Health Corp.*, 667 F. Supp. 557, 566 (M.D. Tenn. 1987) (staff accountants non-exempt). Even information technology ("IT") specialists, copy editors and legal assistants — all of whom use "some" or "minimal" job discretion — lack sufficient discretion and independent decisional authority to qualify as exempt.[6]

D. The DOL's 1945 Opinion Letter Concluding That "Medical Detailists" Were Covered by the Administrative Exemption

In 1945 the DOL issued an opinion letter finding that certain "medical detailists" working for an unnamed pharmaceutical company were exempt administrative

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6. *See also Ahle v. Veracity Research Co.*, 2010 U.S. Dist. LEXIS 88250, at *18 (D. Minn. Aug. 25, 2010) (claims investigators were not exempt administrators because their job duties "do not involve **a sufficient degree of discretion and independent judgment** with respect to matters of significance") (emphasis added). IT specialists, copyeditors, claims investigators and legal assistants certainly exercise "some" or "minimal" discretion, but all are non-exempt because they lack *significant* job discretion and independent judgment. 2006 DOLWH LEXIS 60 (opining that senior copy editors are non-exempt); 2006 DOLWH LEXIS 37, at *7 (observing that while legal analysts work independently and use their own judgment to prioritize assignments, including how much time to spend on each assignment, "it is **not sufficient** that an employee makes...limited decisions regarding relatively insignificant matters") (emphasis added); 2006 DOLWH LEXIS 56 (Oct. 26, 2006) (IT support specialists are non-exempt); *Martin v. Indiana Mich. Power Co.*, 381 F.3d 574, 584 (6th Cir. 2004) (reversing grant of summary judgment and holding that computer security specialists are non-exempt).

employees.[7] Upon this solitary letter, Novartis (and its amici) build the claim that for 65 years, until the DOL's 2009 amicus brief below, the agency considered Pharmaceutical Reps exempt from overtime wages. But the 1945 "medical detailist" was consulted for advice in matters of life and death and was a different species from the modern micromanaged Novartis Rep described in the record below. (Pgs. 16-17 *infra*).

The DOL's 1945 letter stated that the detailists' work "appears to require a high degree of technical knowledge...[and] these men are said to be experts...[who] are consulted with respect to...problems encountered by hospitals and physicians including questions concerning epidemics." *Id.*

An authoritative source, moreover, confirms that the Pharmaceutical Rep of that era was "a scientifically trained graduate in pharmacy, pharmaceutical chemistry, pharmacology, or biology. He usually has a bachelor of science or higher degree. He is well versed in chemistry, bacteriology, physiology, and pharmacology and obviously thinks as a scientist." Arthur F. Peterson, *Pharmaceutical Selling, "Detailing" and Sales Training* 26 (2d ed. 1959). Furthermore, the Rep or detailist of the 1940's, '50's and early '60's worked on commission, arranging sales of specific quantities of drugs to pharmacies and "physicians' supply houses," and on occasion to physicians themselves. *Id.* at 119, 166-67, 189, 198. The old-style Rep also conducted market research on his territory and had the authority to remove physicians from his "detail" list. *Id.* at 73. As discussed *infra*, the duties of the modern Novartis Rep

7. 2 Lab.L.Rep. (CCH) ¶ 33,093 (3d Ed. 1946).

are far more circumscribed and are stripped of meaningful job discretion. (Pgs. 16-17).

E. The Outside Sales Exemption Regulations

Section (3)(k) of the FLSA defines "sale" or "sell" as "any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition." 29 U.S.C. § 203(k). The DOL's regulations, promulgated under its authority to define and delimit the outside sales exemption, explain that an "outside salesman" is an employee whose primary duty is "making sales within the meaning of section 3(k)...or...obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer; and...[w]ho is customarily and regularly engaged away from the employer's place or places of business..." 29 C.F.R. § 541.500(a).

A task qualifies as "making sales" only if it involves the "transfer of title to tangible property," *id.* § 541.501(b), and a customer's "commitment to buy." 69 Fed. Reg. at 22,162-63 ("Employees have a primary duty of making sales if they 'obtain a commitment to buy' from the customer and are credited with the sale.") (quoting 1949 Weiss Report at 83). An employee who *promotes a product that someone else will later sell* does not "make a sale" as contemplated by the outside sales exemption. 29 C.F.R. § 541.503(a) ("[P]romotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work....").

Virtually from the birth of the FLSA, business interests have pressed the DOL to extend the outside sales exemption to employees who, like Novartis's Reps,

are "missionary men" *i.e.*, promoters who don't make their own sales.[8] For more than seven decades, the DOL has steadfastly refused these petitions. *See* Wage and Hour Division, U.S. Department of Labor, *Executive, Administrative, Professional * * * Outside Salesman Redefined, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition* 46-47 (Oct. 10, 1940) ("Stein Report") (stating that "exemptions have been asked" for "sales promotion and missionary men," but that "it would be an unwarrantable extension" of the outside sales exemption **"to describe as a salesman anyone who does not in some sense make a sale" and "sales promotion and missionary men are persons who normally make no sales at all."**) (emphasis added); 2004 preamble, 69 Fed. Reg. at 22,162 ("The Department does not intend to change any of the essential elements required for the outside sales exemption.") (citing Stein Report).[9]

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8. *See* 69 Fed. Reg. 22,162 (preamble to current rule).

9. See also *Clements v. Serco, Inc.*, 530 F.3d 1224 (10th Cir. 2008) (private recruiters who "sold" idea of joining the army to potential enlistees, but didn't obtain binding commitments, were not outside salesmen; the enlistees signed up at U.S. Army stations and the recruiters merely promoted sales made by someone else); *Wirtz v. Keystone Readers Services, Inc.*, 418 F.2d 249, 260 (5th Cir. 1969) ("To the extent that [Plaintiffs] are engaged in promotional activities designed to stimulate sales which will be made by someone else, the work [is] non-exempt.").

In *accord*: 2006 DOLWH LEXIS 65, at *5 ("Soliciting promises of future charitable donations or 'selling the concept' of donating to a charity does not constitute 'sales' for purposes of the outside sales exemption."); 1998 DOLWH LEXIS 17, at *7 (a college recruiter was not an outside salesperson where he "is

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PROCEEDINGS BELOW

Plaintiffs, representing the Respondent-Reps, filed class and collective actions against Novartis in the Southern District of New York and the Central District of California and alleged that Novartis's Reps are entitled to overtime under the FLSA and state law. The cases were consolidated in the Southern District of New York. After the District Court certified a class, Novartis and the class cross-moved for summary judgment on liability. The trial court granted summary judgment for Novartis, finding that Respondents were exempt from overtime under both the outside sales exemption and the administrative exemption. (69a).

A unanimous panel of the Second Circuit vacated the judgment and remanded. As to the outside sales exemption, the Second Circuit noted that the Secretary of Labor, participating in the appeal as *amicus curiae*, stated in her brief that the DOL regulations "make it clear that a person who merely promotes a product that will be sold by another person does not, in any sense intended by the regulations, make a sale." (26a). Here, while "the Reps may give physicians free samples," they "cannot transfer ownership of any quantity of [a] drug in exchange for anything of value." (27a). Nor do the

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engaged in identifying qualified customers, i.e., students, and inducing their application to the college, which in turn decides whether to make a contractual offer of its educational services to the applicant."); 1994 DOLWH LEXIS 65 ("Selling [the] concept [of donating human tissues] does not constitute 'sales' within the meaning of the regulations" and neither is "buying into the merits" of a product purchase).

Reps obtain doctors' "commitment[s] to buy." (30a). "There is no genuine dispute," the court noted, "over the sales path generally traversed by Novartis pharmaceuticals.... Novartis sells its drugs to wholesalers; the wholesalers then sell them to pharmacies; and the pharmacies ultimately sell the drugs to patients who have prescriptions for them. The Reps promote the drugs to the physicians; the Reps do not speak to the wholesalers or to the pharmacies or to the patients." (*Id.*) Consequently, held the court, "it is reasonable [for the DOL] to view what occurs between the physicians and the Reps as less than a 'sale,'" and the Secretary's position that the Reps are not outside salespersons deserved *Auer* deference. (28a).

With respect to the administrative exemption, although the District Court addressed both prongs of the "primary duty" test in the DOL regulations (*see supra*), the Second Circuit framed the controlling issue as "whether Novartis has adduced sufficient evidence to allow a rational juror to conclude" that the Reps' primary duty satisfies the *second* prong, *i.e.*, whether such duty "includes the exercise of discretion and independent judgment with respect to matters of significance." (30a).[10] The DOL's *amicus* brief again supported the Reps. "The Secretary takes the position," the court noted, "that for the administrative exemption to apply to the Reps, the regulations require a showing of a greater degree of discretion, and more authority to

10. "For purposes of this appeal, the relevant issue is whether Novartis has adduced sufficient evidence to permit a rational juror to infer that the Reps meet the [discretion] criterion." (30a).

use independent judgment in matters of significance, than Novartis allows the Reps. Again we find it appropriate to defer to the Secretary's interpretation [under *Auer*]." (33a).

Comparing the record evidence of the Reps' job duties to the ten illustrative indicia of administrative job discretion listed in 29 C.F.R. § 541.202(b), the Second Circuit stressed that it was "undisputed" that the Reps:

- have no role in planning Novartis's marketing strategies;
- have no role in formulating the core messages they deliver to physicians;
- are required to visit a given physician a certain number of times per trimester as established by Novartis;
- are required to promote a given drug a certain number of times per trimester as established by Novartis;
- are required to hold at least the number of promotional events ordered by Novartis;
- are not allowed to deviate from the promotional 'core messages'; and
- and are forbidden to answer questions for which they have not been scripted. (34a-35a).

The Court also observed that the Reps cannot exceed promotional budgets or bind Novartis on any important matters. (34a). Novartis so tightly manages its Reps that it even directs them on how they must hold their pens when pointing to a visual aid during detail calls. (6a). Unsurprisingly, some Reps testified that they viewed themselves as "robots." (7a).

Given these numerous undisputed job restrictions, the Second Circuit agreed with the DOL that "the Reps are not bona fide administrative employees within the meaning of the FLSA and the regulations." (35a). The court therefore vacated the judgment for Novartis. *Id.*

NO WRIT SHOULD ISSUE AS TO EITHER OVERTIME EXEMPTION

A. The Court Should Deny *Certiorari* on the Administrative Exemption

1. The Court Should Not Grant *Certiorari* to Weigh Facts

Novartis contends that the Second Circuit erred in concluding that Novartis Reps exercise insufficient discretion and independent judgment to fall within the administrative exemption. (Pet. 10-11). Respondents disagree. Novartis's arguments that the Court of Appeals misconstrued the voluminous record should be disregarded, because the Supreme Court does not sit to correct this kind of purported error. *See Superintendent v. Hill*, 472 U.S. 445, 460-61 (1985) ("We do not grant *certiorari* to review evidence and discuss specific facts.").

2. There Is No Circuit Split on the Administrative Exemption

Novartis contends that the decision here conflicts with decisions of the Third Circuit in *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010), and the District of Columbia Circuit in *Robinson-Smith v. GEICO*, 590 F.3d 886 (D.C. Cir. 2010). But there is no circuit split. Each case turned on its own facts, and the *Smith* and *Robinson-Smith* courts applied the same legal test that the Second Circuit did.

In *Smith*, the following facts were sharply different from this case: (1) the plaintiff Rep testified that drug maker Johnson & Johnson gave her the freedom "to run [her] own business," 593 F.3d at 282; and (2) the DOL did not file an *amicus* brief supporting the Rep's claim that she was not exempt. The Third Circuit held that the *Smith* Rep was an exempt administrative employee but took pains to limit its ruling to the facts before it. Noting pointedly that the appeal in the *Novartis* case had not yet been argued, the *Smith* court cautioned that "based on different facts, courts, including this Court, considering similar issues involving sales representatives for other pharmaceutical companies, or perhaps even for J&J, might reach a different result than that we reach here." *Id.* at 283 n.1. Nothing in the decision below contradicts *Smith*.

In *Robinson-Smith* — another appeal in which the DOL did not appear as *amicus curiae* — the D.C. Circuit concluded that automobile insurance adjusters possessed a high "level of autonomy" plus "ample, unsupervised discretion" and therefore satisfied the

administrative exemption. 590 F.3d at 892. In *Robinson-Smith,* the average adjuster negotiated more than 1,000 claims totaling over $2.5 million annually. *Id.* Novartis reads *Robinson-Smith* as holding that any employee who exercises "only minimal" or "some" discretion satisfies the administrative exemption. (Pet. 7-8, 22). But *Robinson-Smith* did not so hold.

Rather, the undisputed record in *Robinson-Smith* showed that *when the adjusters exercised discretion* they did so in relation to matters of financial significance. The adjusters had "full authority" to *bind* the insurer by settling total loss claims for up to $10,000 or $15,000, 590 F.3d at 894-95. *See also* 29 C.F.R. § 541.207(d)(2) (employees exercise discretion as to matters of significance if they "exercise authority within a wide range to commit their employer in substantial respects financially or otherwise"). The adjusters argued, however, that they were non-exempt because they negotiated large claims only "occasional[ly]" or "some" of the time, and consequently, such negotiations were outside their "primary duty," which, they contended, was fact finding and appraisal. 590 F.3d at 895-96. But the D.C. Circuit disagreed.

The court noted that the applicable regulation, 29 C.F.R. § 541.2, "requires that the [employee's] primary duty 'include[]' the exercise of discretion and independent judgment; it does not specify how frequently discretion need be exercised." *Id.* at 894. The court went on, moreover, to examine the components of the adjusters' appraisal duties in some detail and to hold that even in appraisals the adjusters exercised sufficiently high-level discretion and independent

judgment to qualify as overtime-exempt. *Id.* at 896-97.[11] Thus, *Robinson-Smith* does not stand for the simplistic proposition that "some" or "minimal" discretion in any aspect of an employee's job renders the employee an exempt administrator. Unlike the *Robinson-Smith* adjusters, Novartis's Reps cannot bind Novartis "on any significant matter." (34a). There is no tension that this Court needs to resolve between *Robinson-Smith* and the Second Circuit's decision below.

3. The Second Circuit Did Not Address the Entire Administrative Exemption

The Second Circuit's ruling as to the administrative exemption is unsuited for *certiorari* for the additional reason that the exemption is not presented fully for review. To win on the administrative exemption, Novartis must show that the Reps "meet every requirement" of the exemption. *E.g.*, *Mitchell v. Williams*, 420 F.2d 67, 69 (8th Cir. 1969). The Second Circuit, however, ruled in favor of the Respondents on the second part of the exemption ("discretion and independent judgment") and did not reach the first requirement (that the Reps' primary duty be "directly related to [Novartis's] management or general business operations"). Consequently, even if this Court grants review as to the "discretion" prong and reverses, it will have adjudicated only half the administrative exemption

11. As the D.C. Circuit noted, a DOL regulation issued after the complaints in *Robinson-Smith* were filed states that the duties of claims adjusters, *e.g.*, "inspecting property damage" and preparing damage estimates, can bring them within the administrative exemption. 29 C.F.R. § 541.203(a) (promulgated in 2009).

because the "directly related" determination would still need to be decided on remand.[12]

4. The Second Circuit's Ruling Is Narrow and Unsurprising

Novartis argues that *certiorari* should be granted as to the administrative exemption because the decision below will have widespread consequences. But Novartis vastly exaggerates the decision's novelty and impact. Novartis presumes that Reps across the drug industry perform the same duties and therefore the Second Circuit's ruling will affect all drug manufacturers.. (Pet. 9 n.4). This premise is wrong. One size doesn't fit all in the pharmaceutical business. Novartis micromanages its Reps far more than do other pharmaceutical companies. It is therefore entirely possible that courts applying the same test that the Second Circuit used below will find that Reps for other drug manufacturers are exempt administrative employees. Indeed, some courts already have so ruled.[13] This appeal does not

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12. Two recent Second Circuit precedents on the "directly related" prong, *Reiseck v. Universal Communications of Miami, Inc.*, 591 F.3d 101 (2d Cir. 2010), and *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 535 (2d Cir. 2009), *cert. denied*, 130 S.Ct. 2416 (2010), strongly intimate that, had the Second Circuit addressed the issue, the court would have ruled the Reps do not perform work directly related to Novartis's management and general business operations.

13. In *Amendola v. Bristol-Meyers Squibb*, 558 F. Supp. 2d 459 (S.D.N.Y. 2008), the Court held that the Reps employed by Bristol-Meyers Squib ("BMS") were administratively exempt. A BMS Rep exercises far more job discretion than his or her Novartis counterpart. Unlike Novartis, BMS requires that its

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affect the drug business as a whole, let alone any other industry. It carries no implications beyond its peculiar facts involving a single company — Novartis — that smothers its Reps with suffocating controls.

Novartis implies (Pet. 9) that, because the DOL did not expressly opine until its 2009 *amicus* brief that a Pharmaceutical Rep was eligible for overtime, the drug industry could reasonably assume that for seventy years the agency viewed all Reps as exempt. This position is baseless. The DOL is not a commissariat of American industry; it has neither the obligation nor the resources to spoon-feed legal advice to the pharmaceutical industry or any of the thousands of businesses in the country.

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Reps have pharmaceutical experience and expertise. BMS also allows its Reps to determine which physicians they will visit on detail calls. *Id.* at 464. And BMS encourages its Reps to conduct independent medical research and to be self-directed in their calls.

The exempt Alpharma Rep in *Jackson v. Alpharma, Inc.*, 2010 U.S. Dist. LEXIS 72435 (D.N.J., July 19, 2010), also has significantly more discretion than a Novartis Rep. *Id.* at *4.

Amendola and *Jackson* teach that even though the current FDA regulatory system restricts what a Pharmaceutical Rep can say about a drug, there are still realms of substantial discretion that a Rep's employer can vest him with — discretion which Novartis removes from the Respondents. It is not the FDA's restrictions that prevent a Novartis Rep from exercising the discretion of an exempt administrator, but instead the Company's decision to straitjacket its Reps beyond the norm other drug manufacturers apply. Novartis's idiosyncratic control of its Reps narrows the effect of the Second Circuit's administrative exemption decision, and undermines *certiorari* on that exemption.

"Congress did not seek to secure [FLSA] compliance...through...detailed federal supervision.... Rather, it chose to rely on...complaints from employees." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). It was up to Novartis to monitor its compliance with the FLSA and the overtime regulations. Because Novartis failed in that task, the FLSA gave Novartis's Reps the right to sue.

Novartis also argues that the pharmaceutical industry's seventy-year practice of denying overtime pay to its Reps is sacrosanct and therefore this Court should order *certiorari* to endorse that custom. In *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 741 (1981), however, this Court cautioned that an industry cannot seek refuge in "customs" or "practices" to excuse violations of the FLSA. Novartis cannot credibly plead surprise or industry custom as considerations which favor granting certiorari.

B. The Court Should Deny *Certiorari* on the Outside Sales Exemption

1. There Is No Circuit Split on the Outside Sales Exemption

Certiorari should likewise be denied as to the Second Circuit's decision on the outside sales exemption. The ruling does not create a circuit split because the Second Circuit is the only court of appeals that has addressed the application of the outside sales exemption to Pharmaceutical Reps. On November 3, 2010, the Ninth Circuit heard oral argument on the issue of whether the FLSA's outside sales exemption applies to

Reps for other drug makers.[14] *If* the Ninth Circuit's decision creates an actual intercircuit conflict, the Court can then decide whether to review the status of Pharmaceutical Reps under the outside sales exemption.[15] There is no reason to grant *certiorari* as to that exemption now.

2. The Second Circuit Correctly Applied Settled Law

Novartis makes several merits arguments regarding the outside sales exemption, but none of them are *certiorari*-worthy and all are wrong. Novartis and *amici* repeatedly invoke the Department of Labor's statement in the preamble to the current outside sales rule that an outside salesperson must "in some sense" make a

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14. *Christopher v. SmithKline Beecham Corporation*, No. 10-15257.

15. Novartis inaccurately suggests that most district courts have held that pharmaceutical sales Reps qualify for the outside sales exemption. (Pet. Br. at 14, n.9). The majority of the cases cited by Novartis, however, involve **state law** versions of the outside sales exemption and **not the FLSA**. *E.g. Baum v. Astrazeneca LP*, 605 F. Supp. 2d 669 (W.D. Pa. 2009) (Pennsylvania law); *Brody v. Astrazeneca Pharms., LP*, 2008 U.S. Dist. LEXIS 107301 (C.D. Cal. June 11, 2008) (California law); *Menes v. Roche Labs., Inc.*, 2008 U.S. Dist. LEXIS 4230 (C.D. Cal. Jan. 7, 2008) (same). When it comes to the FLSA's exemption, however, most federal courts have held that pharma Reps are **not outside salespersons**. In addition, *Christopher*, – which ruled that the FLSA exemption applies – is pending in the Ninth Circuit, so it is not appropriate to rely on that case until the Ninth Circuit issues a decision.

sale. (Pet. 6, 8, 23). But Novartis ignores the immediately following statement in the regulations that a sale involves a transfer of title or a commitment to buy and that the exemption does not extend to those who promote so that others may sell. 29 C.F.R. §§ 541.501(b) to 503. As the Second Circuit properly held, promoters like Novartis's Reps "in no sense" make a sale. (29a).

There is nothing surprising about this conclusion that could justify *certiorari*. The DOL has never opined that Pharmaceutical Reps are exempt outside salespersons, and for good reason. Reps make no sales. They visit physicians – usually for under five minutes – and the doctors do not purchase drugs themselves. The Reps recite a pre-scripted message about their employers' drugs in the hope that doctors will prescribe these drugs. If a doctor prescribes the drug, *another* party — a hospital or retail pharmacy ---- will buy those drugs from *yet another* party, a wholesaler. The Reps don't discuss the price or quantity of the Novartis drugs that they detail. They have no contact with the person or entity paying money to buy a Novartis pharmaceutical. And a doctor cannot realistically "commit" to prescribe a drug because such a promise is unenforceable. (8a). There is little wonder, then, that in different litigation contexts such as product liability suits **Novartis and other drug manufacturers have argued that their Reps don't sell drugs.**[16] And it is just as unsurprising that in its annual Form 20-F public filings, Novartis sharply distinguishes between the

16. In *DaCosta v. Novartis Pharmaceuticals Corp.*, 242 F. Supp. 2d 765 (D. Or. 2002), a product liability suit, Novartis (Cont'd)

Reps' marketing duties and the Company's sale of prescription drugs "primarily to wholesale and retail drug distributors, hospitals, clinics, government agencies and managed healthcare providers."[17]

Novartis argues that the words "other disposition" in the FLSA's definition of "sale," 29 U.S.C. § 203(k) ("any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition"), extend the meaning of "sale" beyond a true sale or transfer of title to encompass the Reps' low-level promotional work. (Pet. 6, 24). The Second Circuit correctly rebuffed this construction, applying the canon of *ejusdem generis* and concluding that each of the examples in the statutory definition involves a transfer of title and an enforceable commitment to buy. (26a-27a). Indeed, federal courts interpreting the term "other disposition" in other statutes where those two words appear after the word

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(Cont'd)
filed an affidavit in which one of its Reps, Leonard Weaver, swore that:

> **"As a sales representative, I do not sell drugs to doctors or to anyone else...."**

In another product liability case, *Gordon v. Pfizer, Inc.*, 2006 WL 237002, at *5 (N.D. Ala. May 22, 2006), Pfizer proffered sworn declarations from its Pharmaceutical Representatives stating:

> At no time did I ever sell, offer to sell, or take orders for the sale of Bextra to healthcare providers, physicians or patients.

17. *See* Novartis SEC Filing, "AG Form 20-F," at 43 (2009), *available* at http://access.edgar-online.com, search Novartis, last 12 months.

"sales" have uniformly construed "other disposition" to require a transfer of title to property.[18]

Novartis's *amici* attempt to show that the outside sales exemption applies here by injecting into that exemption the broad definition of the term "sales" from the FLSA's **coverage** provisions. (PhRMA Am. Br. 15). That effort, too, misses its target. The FLSA covers enterprises that generate $500,000 of "business" or "sales" per year. 29 U.S.C. § 203(s). The regulatory definition of "sales" for purposes of the coverage provision states that "an employee who in any way participates in the sale of goods[] will be considered selling the goods." 29 C.F.R. § 779.241. *Amici*'s argument that this general coverage language overrides

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18. *Udall v. Tallman*, 380 U.S. 1, 19 (1965), ("'[S]ale' and 'entry' are...terms contemplating transfer of title.... It [is]...reasonable...to construe 'other disposition' to encompass only dispositions which like [those previously] enumerated...convey[]...title."). See also *Weisbart & Co. v. First National Bank*, 568 F.2d 391, 395 (5th Cir. 1978) (doctrine of *ejusdem generis* meant that "other disposition" language in provisions containing terms "sale, exchange, or other disposition" required transaction involving transfer of property).

To the same tenor are *In re McDonnell*, 224 B.R. 862, 869 (Bankr. S.D. Ga. 1998) (Under Uniform Commercial Code § 9-306(2) "a secured party loses its security interest in collateral when it authorizes...the 'sale,' 'exchange,' or **other disposition of the collateral.**" The Court held that "other disposition" refers to a transaction of the same general type as a sale or exchange. Thus, "other disposition" must meet the threshold test by effecting a transfer of property.).

the specific limitations in the outside sales regulations was properly rejected more than four decades ago in *Wirtz v. Keystone Readers Services, Inc.*, 418 F.2d 249, 261 (5th Cir. 1969) (citing "the rule that the coverage provision should be liberally construed while the exemptions are to be narrowly construed"). *Wirtz*'s ruling was followed in *Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 308, 318 (D.Conn. 2008). Like the other claims of error discussed above, this specious argument supplies no basis for *certiorari*.

C. The Court Should Not Grant *Certiorari* to "Clarify" or Disturb *Auer*

Auer v. Robbins held that when the DOL's overtime regulations are deemed ambiguous, courts must give controlling deference to the agency's interpretation of its regulations, including interpretations set forth in an amicus brief, unless the construction is plainly erroneous. 519 U.S. at 461; *see also Federal Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008). *Auer* deference applies to administrative statements generally and is not limited to the context of overtime litigation. *See Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2473-77 (2009) (granting *Auer* deference to internal Environmental Protection Agency memorandum).

Auer provides a readily understandable rule that guards against inconsistent agency positions by directing greater scrutiny to changed interpretations. *See id.* Novartis does not and cannot claim that the circuits are divided on how *Auer* should be utilized. There is no circuit split. Federal courts throughout the

country have followed *Auer* without difficulty.[19] The Second Circuit properly granted *Auer* deference here. The positions taken by the DOL as *amicus* are consistent with the regulations and do not contradict any prior agency statements applying the overtime exemption regulations to the same or substantially similar facts. To the contrary, the DOL's *amicus* position conforms with seventy years of administrative practice establishing that: A) an outside salesman must obtain a commitment to buy and, consequently, mere promotional work is in no sense a sale; and B) an employee is an exempt administrator only if he exercises a "high" level of job discretion.

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19. *See, e.g., Sec'y of Labor v. Beverly Healthcare-Hillview*, 541 F.3d 193, 200 (3d Cir. 2008) (holding that the Secretary of Labor's interpretation of an OSHA regulation was reasonable and therefore entitled to *Auer* deference because it did not impermissibly strain the plain language of the regulation and the interpretation was consistent with the purpose of the regulation); *IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 295-96 (4th Cir. 2007) (deferring to the DOL's interpretation of its regulation in an amicus brief where the regulation was ambiguous and the DOL's interpretation was consistent with the plain meaning of the regulation); *Rucker v. Lee Holding Co.*, 471 F.3d 6, 12 (1st Cir. 2006) (granting controlling weight to the DOL's interpretation of its regulation where the DOL's position was consistently held and consonant with the language of the regulation); *Archuleta v. Wal-Mart Stores, Inc. (In re Wal-Mart, Inc.)*, 395 F.3d 1177, 1185 (10th Cir. 2005) ("We see no reason to accord less deference to [DOL] Wage & Hour opinion letters than the Supreme Court gave to the position of the DOL set forth in an amicus brief to the Court,...particularly when, as shown below, the letters reflect a consistent view over an extended period of time....").

Novartis and *amici* argue (Pet. 28; Chamber of Commerce Am. Br. 3) that the Court should grant *certiorari* here in order to "clarify" *Auer*. The proffered "clarification," however, is unnecessary and unworkable and would throw administrative law into disarray. In *Auer's* place, Novartis and *amici* seem to propose a multi-tiered edifice with different degrees of deference to *amicus* briefs depending on whether a brief represents an agency's "considered" views. But agencies are by now well aware that their briefs may receive *Auer* deference and can monitor those filings accordingly. Further, in light of the DOL's seventy-year positions that (I) promoting is not selling and (II) "high-level" discretion alone satisfies the administrative exemption, there is certainly no reason to suspect that the DOL's *amicus* brief in this case did not reflect the Department's considered views or was a *post-hoc* rationalization.

The attack by Novartis and *amici* on the Second Circuit's use of *Auer* is a poorly disguised, result-oriented request for this Court to overturn *Auer* and prevent the DOL from submitting effective *amicus* briefs in pending overtime litigation. Tinkering with settled administrative law for that narrow purpose would only generate uncertainty without redeeming benefits. The appropriateness of *Auer* deference in this matter is not a close call for ordering certiorari.

D. *Certiorari* Should Be Denied Because Novartis's and Its Amici's Assertions of Surprise and Damage to Pharmaceutical Manufacturers Are Belied by the Drug Industry's Own Actions

Just six months ago, Pfizer entered into a multi-billion dollar "Corporate Integrity Agreement" with the federal government after the Company illegally promoted "off-label" uses for its drug Bextra.[20] As part of the settlement, Pfizer's sales representatives **must** carry a "Tablet PC system" laptop computer whenever they visit doctors' offices on detail calls. The "Tablet" instantly records interactions between a Pfizer Rep and a physician and stores this information on a centralized computer.[21]

Even though the Tablet markedly reduces a Rep's job flexibility, Pfizer has expressed enthusiasm for this innovation and stated that **"all Reps are incredibly supportive of this."**[22]

Undoubtedly, Pfizer is one member of the pharma amici chorus here lending its voice to the Petition's plaint that paying a Rep overtime wages will rob the Reps of their job freedom and cripple Novartis. But when Pfizer signed the Corporate Integrity Agreement

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20. Corporate Integrity Agreement, available at http://oig.hhs.gov/fraud/cia/agreements/pfizer_inc_08312009.pdf.

21. *See* Peter Loftus, *Pfizer Adds New Type of Tablet to Sales Call, Giant Rolling Out Portable PC System Designed to Ensure Salespeople Comply with Regulations on Drug Marketing*, WALL STREET JOURNAL, Dec. 15, 2009, at B4.

22. Statement of David Kreutter, Pfizer's VP of commercial Operations, *Id.*

with the government, it praised the Tablet system even though a Tablet diminishes a Pfizer Rep's customary job discretion. This inconsistency parallels the pharma companies' posturing in product-liability suits. In those cases they insist that their Reps don't sell drugs, but here they shift gears and peddle a counter-narrative, expressing "shock" over the Second Circuit's ruling and the DOL's position that Reps are not outside salespeople. Such flip-flopping on both exemptions undermines the plea of "surprise" which is the main theme of Novartis's Petition for *certiorari*.

CONCLUSION

The Second Circuit's ruling that the Respondent-Reps fall outside the FLSA's administrative exemption is a fact-specific, narrow decision predicated largely on the rigorous control which Novartis exercises over its Reps. There is no circuit conflict regarding the legal standard under the exemption. All courts agree with the DOL's seventy-year-old position that an employee must exercise a "high" level of discretion and independent judgment to become an exempt administrator. Moreover, the Second Circuit addressed only part of the administrative exemption's prerequisites and therefore this exemption is poorly postured to be decided here.

Just as unsuitable for review is the Second Circuit's finding that the Reps are not exempt outside salespersons. For over seventy years, the DOL and courts have agreed that promoters – like the Respondent Reps – are not sellers. Thus far, there is no circuit split on whether the outside sales exemption covers pharmaceutical Reps.

Finally, Novartis's and amici's request for "*Auer* clarification" and their policy arguments for granting *certiorari* are baseless.

The Petition for *certiorari* should be denied in its entirety.

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NOVARTIS PHARMACEUTICALS CORPORATION,

Petitioner

v.

SIMONA M. LOPES, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. The Decision Below Presents Important Legal Issues With Far-Reaching Ramifications

The Second Circuit's alteration of the legal standards governing the administrative and outside sales exemptions under the Fair Labor Standards Act ("FLSA") has far-reaching significance. These new standards determine whether American businesses must restructure their workforces to comply with the FLSA and are liable for massive retroactive overtime pay. Unquestionably, that is why the Chamber of Commerce has appeared as an amicus curiae in support of the Petition.

Respondents nevertheless portray the Second Circuit's decision as "fact-specific", "narrow" and without "wide-ranging consequences". Opp. 2. But Respondents' contention that the decision is limited to "a single company" with "suffocating controls", Opp. 22, fails to explain why every major pharmaceutical company has been confronted with the same allegations concerning their sales reps—including by Respondents' counsel;[1] and why the Department of Labor ("DOL") filed an unsolicited amicus brief below and then argued that the Ninth Circuit should follow *Novartis* because SmithKline's

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[1] *E.g.*, Reply Mem. of Law in Further Support of Mot. for 216(B) Notice at 14 n.16, *Amendola v. Bristol-Myers Squibb Co.*, No. 07-Civ.-6088, (S.D.N.Y. Feb. 29, 2008), ECF No. 40 (arguing that "[sales reps] today are constrained by FDA oversight and regulation . . . . [They] must follow strict guidelines when promoting products and . . . do not have a wide degree of discretion").

sales reps are "nearly identical" to Novartis's. *See* Br. for DOL as Amicus Curiae Supporting Pls.-Appellants at 13-14, 22, *Christopher v. SmithKline Beecham Corp.*, No. 10-15257 (9th Cir. Aug. 10, 2010), ECF No. 34.

Indeed, the decision below already has impacted not only other pharmaceutical companies, *see Harris v. Auxilium Pharms., Inc.*, No. 4:07-cv-3938, 2010 WL 3817150, at *3-4 (S.D. Tex. Sept. 28, 2010) (granting plaintiffs' motion for reconsideration and "adopt[ing] the reasoning of the Second Circuit" on both exemptions), but also other industries, *e.g.*, *Harper v. Gov't Emps. Ins. Co.*, — F. Supp. 2d —, No. CV09-2254, 2010 WL 4791635, at *4-5 (E.D.N.Y. Nov. 16, 2010) (*Novartis* is "binding" law on the administrative exemption).

II. The Second Circuit's Rejection of the Administrative Exemption Is in Square Conflict with Decisions of the Third and D.C. Circuits

The decision below creates a split among the courts of appeals in two critical (and independent) respects: first, regarding the application of the administrative exemption to pharmaceutical sales reps specifically, *see Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010); and second, regarding the application of the administrative exemption to employees generally, *see Robinson-Smith v. Gov't Emps. Ins. Co.*, 590 F.3d 886 (D.C. Cir. 2010). Respondents' contention that "there is no circuit split" because "[e]ach case turn[s] on its own facts", Opp. 18, is demonstrably wrong.

As to the circuit conflict directly involving pharmaceutical sales reps, Third Circuit cases subsequent to *Smith* make clear that the decision sustaining the administrative exemption is not a one-off ruling confined to the facts of the case. On the contrary, in *Baum v. AstraZeneca LP,* the Third Circuit applied *Smith* to uphold the administrative exemption for an AstraZeneca sales rep because her "duties were very similar to the plaintiff's duties in *Smith*". 372 Fed. App'x 246, 249 (3d Cir.), *cert. denied*, 131 S. Ct. 332 (2010). Similarly, in *Jackson v. Alpharma, Inc.*, the district court rejected plaintiffs' attempt to distinguish *Smith* on factual grounds. No. 07-3250, 2010 WL 2869530, at *4 (D.N.J. July 19, 2010). Although acknowledging that, in contrast to *Smith*, there was no "direct testimony of the plaintiffs regarding their autonomy and independent nature," the court nonetheless found that "the underlying facts differ little from the facts in *Smith*". *Id.* Finding the sales reps' exempt status "clear" under *Smith* and *Baum*, the court declined even to consider the Second Circuit's decision. *Id.* at *4-5.

Contrary to Respondents' contentions, Opp. 21 & n.13, had these cases been governed by *Novartis*, rather than *Smith*, the outcomes would have been different because the Second Circuit created a materially different legal standard in mistaken deference to DOL. Under the Second Circuit's new heightened standard for "discretion and independent judgment", the application of the same statute to the same facts—an environment strictly controlled by FDA regulations—produces different results depending on whether the parties litigate in the

Second or Third Circuit. Despite Respondents' denials, both sales reps and pharmaceutical companies appear to understand that there are two different legal regimes, as evidenced by recent motions to transfer venue to the Second Circuit by plaintiff-sales reps and motions to transfer venue to the Third Circuit by drug company-defendants.[2] Averting forum shopping fomented by a circuit split is another reason for the Court to act now. *See Yee v. City of Escondido*, 503 U.S. 519, 538 (1992).

There is also an irreconcilable split between the decision below and the D.C. Circuit's decision in *Robinson-Smith*. Again, Respondents argue that the facts in the two cases are distinct. Opp. 19-20. But, again, the difference lies in the governing legal standard. In the D.C. Circuit, the exercise of "some discretion" in matters of significance would have clearly qualified Novartis's sales reps for the administrative exemption.[3] *Robinson-Smith*, 590

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[2] *See* Pl.'s Mot. for Transfer, *In re Boehringer Ingelheim Pharms., Inc. Overtime Pay Litig.*, No. 10-cv-22398-UU (J.P.M.L. Dec. 6, 2010), ECF No. 54; Mem. in Supp. of Def.'s Mot. to Transfer, *Heldman v. King Pharms., Inc.*, No. 3:10-cv-01001 (M.D. Tenn. Nov. 19, 2010), ECF No. 12; Mem. in Supp. of Mot. to Transfer Venue, *Quinn v. Endo Pharms, Inc.*, No. 10-11230 (D. Mass. Oct. 21, 2010), ECF No. 13.

[3] As the district court noted, it is "self-evident" that sales reps' discretionary activities relate to matters of significance because reps seek "to influence prescription writing practices—a matter of great consequence" to pharmaceutical companies' business. App. 77a (internal quotation omitted).

F.3d at 893-94 ("Although the parties disagree on how much discretion the adjuster exercises, no one disputes that he exercises 'some'."). In the Second Circuit, however, "some discretion" is legally insufficient.[4]

This conflict in legal standards is underscored by a recent decision in the Eastern District of New York involving the application of the administrative exemption to a class of GEICO telephone adjusters. *See Harper*, 2010 WL 4791635, at *1. In *Robinson-Smith*, the D.C. Circuit characterized telephone adjusters as being at "the higher end of the responsibility scale", exercising more discretion and independent judgment than the auto damage adjusters at issue in that case, whom the court found were exempt. 590 F.3d at 888, 897. Nonetheless, although acknowledging that *Robinson-Smith* was "particularly on point", "well-reasoned" and "persuasive", the court held that the administrative exemption did not apply to telephone adjusters

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[4] According to Respondents, DOL has stated that the administrative exemption requires a "high level of discretion and independent judgment". Opp. 8-9 (citing authorities). This contention, however, is not supported by the authorities Respondent cites. The 1997 DOL opinion letter involves wholesalers and merely restates the governing regulations regarding use of skill in applying well-established techniques. The Weiss Report concerns the first prong of the exemption and is inapplicable here. Respondents' argument is further belied by the 2004 Final Rule, which clarified that the exemption requires only that the employee's primary duty "include" the exercise of discretion and independent judgment. App. 142a.

because *Novartis*, which controls in the Second Circuit, represents "a very narrow interpretation of the FLSA administrative exemption". *Harper*, 2010 WL 4791635, at *4-5.[5]

III. The Decision Below Is a Sharp Break from Settled Regulatory Standards That Upsets Justified Expectations.

Respondents' characterization of the Second Circuit decision as "nothing new or surprising"—a "straightforward" application of "settled" regulatory standards, Opp. 1, 3—is an exercise in revisionism that ignores both the roots and evolution of the exemptions, culminating in the 2004 notice-and-comment rulemaking, as well as the historic treatment of pharmaceutical sales reps for the last seven decades. *See* Pet. 3-8, 12-14.

The Second Circuit's abrupt alteration of the legal standards that determine whether millions of workers are entitled to overtime pay conflicts with the DOL regulations from 1940 to 2004. Contrary to Respondents' contention, Petitioner does not rely on

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[5] Respondents make much of the Second Circuit's failure to address the first prong of the exemption, arguing that this somehow makes the Second Circuit's rejection of the exemption's "discretion and independent judgment" prong "unsuitable for *certiorari*". Opp. 20. Unsurprisingly, Respondents cite no authority for this proposition because there is none. On the contrary, the Court routinely grants *certiorari* to review important questions of law even where another issue may be left to resolve on remand. *See, e.g.*, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

a "solitary" DOL opinion, Opp. 4. The pharmaceutical industry's long-standing and universal treatment of sales reps as exempt employees rests on this long regulatory history and most importantly on DOL's 2004 regulations, which codified the applicable standards for the administrative and outside sales exemptions.

The Second Circuit decision merits review because it permits DOL to rewrite the FLSA's white-collar exemptions by means of an amicus brief. To dismiss such a reversal blithely, as Respondents do, *see* Opp. 22-23, is to ignore entirely industry's decades of reliance on the text and history of the statute, Pet. 3-5, its implementing regulations, Pet. 5-8, and judicial precedent, Pet. 13; App. 58a-61a. It was upon this authority that the district court grounded its holding that both exemptions applied to Novartis's sales reps. Pet. 15; App. 40a, 62a, 68a-69a, 78a-79a. Instead, the Second Circuit relied myopically upon DOL's unsolicited amicus brief espousing a narrow view of both exemptions, eschewing their purposeful and historic breadth.

Petitioner's treatment of its sales force as exempt, like the rest of the pharmaceutical industry, is consistent with the governing law. It is a reasonable expectation that the statute and governing regulations will control a court's analysis, and not an amicus brief misinterpreting statutory language and changing DOL's prior considered positions. That employers bear the burden of FLSA compliance, *see* Opp. 23, only heightens the necessity of deliberative and considered rule-making rather than *ad hoc* regulation by amicus brief. Employers should not be required to guess at their peril when

and how DOL might change its mind. This is particularly true when a consequence of guessing wrong is the imposition of massive retroactive liability.

The administrative exemption is premised on the breadth and flexibility of its two prongs, the demonstrated intent of Congress and DOL to make it the most open-ended and flexible of exemptions, and the codification by DOL of decisional law affirming the standard that only "some" discretion in matters of significance is required. The 1945 DOL opinion letter upholding the administrative exemption for medical detailers and the decision in *Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883 (E.D. Pa. 1982), reaching the same conclusion with respect to sales reps thirty-seven years later, provide added justification for the industry's decades-old practice treating its sales reps as exempt administrative employees. Pet. 12-13.

As for the outside sales exemption, the Second Circuit's disregard for the FLSA's expansive definition of sales—which controls the application of the outside sales exemption for all industries—conflicts with the statutory text, DOL regulations and judicial precedent. The 2004 regulations reiterate DOL's long-standing principle, first invoked in the wake of the FLSA's enactment, that the exemption only requires a sale "in some sense". Pet. 6. The decision below instead requires that sales reps make sales *in every sense*, including a formal transfer of title, contrary to the regulations. Pet. 16,

26; App. 27a-29a. Such a rigid interpretation dramatically changes prior law.[6]

Indeed, the Second Circuit decision is at odds with numerous decisions of other courts of appeals on the outside sales exemption. The conflict created by the decision pertains to the statutory definition of "sale", which applies throughout the FLSA, 29 U.S.C. § 203. Tellingly, Respondents do not even attempt to distinguish the cases cited in the Petition that have rejected a "transfer of title" standard under the FLSA. Pet. 25-26.

No interpretative canon can avoid the purposefully broad and flexible definition that Congress gave the term "sale" under the FLSA. The Second Circuit and DOL's attempt to rewrite the regulations fails utterly in light of Congress's broad definition of sales and its application throughout the

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[6] Respondents have parroted the Second Circuit's erroneous misstatement of the statutory and regulatory text by insisting that a sale "*involves*" a transfer of title or commitment to buy. Opp. 12, 25 (emphasis added). The view that a sale must "involve" a transfer of title is nowhere to be found in the statute or its regulations. The FLSA states that "'sale' or 'sell' *includes any sale*, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition*". App. 93a (emphases added). DOL expressly incorporated this definition into its regulations for the outside sales exemption, which state that sales "*include* the transfer of title", App. 107a (29 C.F.R. § 541.501(b)) (emphasis added); *see also* Stein Report at 46 (requiring only a "sale in some sense"). The language of the statute and regulations is expansive and illustrative, not limiting. Pet. 24-25.

FLSA. Pet. 24-25. Because the construction at issue is a statutory definition, not an exemption, and because the statutory language and intent of Congress are clear, the "narrowly construe" canon of construction does not apply. Pet. 23. *See Yi v. Sterling Collison Ctrs., Inc.*, 480 F.3d 505, 508 (7th Cir. 2007).

In substituting its judgment for Congress's language, the Second Circuit ignores fundamental principles of statutory construction: that the statutory definition controls (over a conventional definition) and that defined terms are interpreted consistently throughout a statute. The decision assigns different meanings to the definition of "sale" depending on individual circumstances. DOL interprets the statutory definition of sale in its regulations entitled "Selling" as "in any way participat[ing] in the sale", noting that if an employee "performs any work that, in a practical sense is an essential part of consummating the 'sale' of the particular goods, he will be considered to be 'selling' the goods". 29 C.F.R. § 779.241. Respondents criticize amicus PhRMA's invocation of this "general coverage language" over "the specific limitations in the outside sales regulations", Opp. 27-28, but this criticism overlooks the basic premise that identical words must have the same meaning throughout a statute, *see Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860-61 (1986).

Respondents mischaracterize sales reps as promotion or missionary men who do work that is merely incidental to sales made by another. Opp. 12-13; *see* App. 108a-109a (29 C.F.R. § 541.503(a)). There is no one else in the pharmaceutical industry

who bears the indicia of an outside salesman and for whom sales reps pave the way to make the ultimate sale. The sales reps are often the only point of personal contact between pharmaceutical companies and physicians, who dictate what drugs are purchased though their prescriptions. Pet. 9. Under the Second Circuit's and Respondents' interpretation, pharmaceutical companies generate billions of dollars in sales revenue without any salesmen. This defies common sense and the treatment of the same sales reps by other federal agencies, *see* Pet. 27 n.13.

IV. Review Is Warranted To Address the Application of *Auer v. Robbins* When an Agency's Abrupt Change in Position Upsets Long-Settled Expectations

Respondents assert that *Auer v. Robbins*, 519 U.S. 452 (1997), "provides a readily understandable rule" and clarification is "unnecessary". Opp. 28-30. But confusion abounds over *Auer*'s parameters, warranting the Court's review. Pet. 30-31; PhRMA Amicus Br. 5-13.

First, the Second Circuit applied *Auer* without finding that the regulations were ambiguous, a prerequisite to *Auer* deference. *See Auer*, 519 U.S. at 462-63. The failure of the decision below to engage in any analysis of even this basic premise before applying *Auer* demonstrates the need for this Court

to clarify what *Auer* deference is and when it should be applied.[7]

Second, Respondents belittle NPC's concern about whether DOL's amicus brief represented the agency's "considered" views. Opp. 30. But the *Auer* Court found "no reason to suspect that [DOL's] interpretation does not reflect the agency's fair and considered judgment" in part *because* DOL's approach did not impose "massive and unanticipated [] liability". 519 U.S. at 461-62. Here, in contrast, DOL's amicus position does impose massive and unanticipated liability by rewriting its 2004 Final Rule after it had undergone two decades of public scrutiny and congressional hearings. Thus here, unlike in *Auer*, there is good reason to believe the agency's amicus position does not reflect its "fair and considered judgment".

Finally, and perhaps most incredibly, is Respondents' assertion that *Auer* "guards against inconsistent agency positions by *directing greater scrutiny* to changed interpretations". Opp. 28 (emphasis added). If that were *Auer*'s clear and "readily understandable rule", it somehow eluded the Second Circuit. DOL's amicus position is an abrupt departure from its formal rulemaking, yet the Second Circuit uncritically deferred to DOL's amicus position without even acknowledging its drastic change from DOL's historic treatment of

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[7] Respondents' contention that the Court cannot grant a petition for certiorari to clarify its jurisprudence is unfounded. *E.g.*, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 433 (2002).

pharmaceutical sales reps or the 2004 Final Rule's endeavor to streamline and clarify the white-collar exemptions. Moreover, lower courts have wrestled over the effect of an agency's change in position on the application of *Auer* deference, without any clear consensus. *See* PhRMA Amicus Br. 5-9 (citing authorities). That uncertainty over Respondents' very proposition only highlights the need for the Court's clarification of *Auer*.

Respondents wrongly characterize Novartis's position as a "request . . . to overturn *Auer*". Opp. 30. As the Petition states, *Auer* deference has an appropriate place in the Court's administrative law jurisprudence. What all litigants and the lower courts need is the Court's guidance as to what precisely that place is.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant the petition for a writ of certiorari.

January 17, 2011

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IN THE

Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION
Petitioner,

v.

SIMONA M. LOPES, CATHERINE E. WHITE, *et al.*
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS*[1]

1. The Chamber of Commerce of the United States of America (the "Chamber") is the largest federation of businesses and associations in the world and serves as the voice of American business. It represents 300,000 direct members with an underlying membership of over three million businesses and organizations of every size, in every sector, from every region of the country.

2. An important function of the Chamber is to give voice to the interests and concerns of American business on important matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. The Chamber has advanced those interests, *inter alia*, by filing briefs in more than 1,700 cases of importance to the business community. Those cases have included many pending before the Court dealing with various aspects of federal employment law. *See, e.g.*, *Staub v. Proctor Hosp.*, No. 09-400; *Thompson v. N. Am. Stainless, LP*, No. 09-291.

SUMMARY OF ARGUMENT

1. This case concerns a number of issues of critical importance to Chamber members regarding the meaning and application of the Fair Labor Standards Act ("FLSA"). The court below construed key components of the FLSA

1. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have been given appropriate notice and letters have been filed with the Clerk of the Court reflecting the consent of the parties to the filing of this brief.

— the Act's "administrative" and "outside sales" overtime exemptions.[2] The resulting opinion overturns settled understandings established by longstanding Department of Labor ("DOL") guidance and consistent application of the Act by the courts regarding who the statute covers and how it is to be administered. The court's opinion creates or deepens intra-circuit divisions of authority on several questions of statutory construction, and it rejects — typically without even mentioning — DOL's own interpretations of the statute on which employers have long relied in structuring their affairs.

2. Most critically for employers, the decision below either directly prohibits or casts significant doubt on FLSA compliance practices that have existed for many decades in sectors of American business *unconnected* to the pharmaceutical industry. Indeed, the decision suggests that every employer in the country that has relied on the "administrative" exemption has done so incorrectly and must reconsider every employee currently classified thereunder, and must do so without meaningful guidance as to the standards that should govern the exercise.

Because employers prize stability in their efforts to comply with federal statutes — particularly complex statutes such as the FLSA — these departures from settled practices create intolerable uncertainty that only this Court can resolve.

3. The Court of Appeals also gave "controlling" deference to the contents of a brief *amicus curiae* filed by DOL relying on *Auer v. Robbins*,[3] but that reliance

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2. 29 U.S.C. § 213(a)(1) (2010).

3. 519 U.S. 452 (1997).

was misplaced. The Court has previously described the preconditions for this sort of deference — including evident, careful attention to the relevant considerations and the absence of unfair surprise for the regulated community — but the Second Circuit failed even to consider these most basic requirements, and failed to consider DOL's brief in the context of all that DOL has previously said on the subject.

Although *Auer* deference may be a useful tool, the undisciplined approach to *Auer* adopted below presents serious concerns to Chamber members. DOL has announced publically that it intends to curtail the use of mechanisms through which it has traditionally provided guidance on application of the statute, while simultaneously saying that it would "reinvigorat[e]" its program of *amicus curiae* participation in court cases, presumably relying on the erroneously expansive reading of *Auer* embraced below.

If the use of *Auer* deference is not confined to the limits the Court has previously articulated — and if those standards are not made unmistakably clear by this Court — DOL's intended course of action threatens profound ramifications for Chamber members. It is one thing to expect that conscientious employers will follow DOL's opinion letters and official announcements, or even to consider the views expressed in briefs solicited from DOL by this Court, as in *Auer*; it is quite another to expect employers to monitor and digest the contents of every *amicus* brief DOL may file in any lower court anywhere in the country, briefs in which DOL can now announce new normative standards that apply retroactively to pending cases, as the brief did here.

The Court has previously warned about the potential for "unfair surprise" when an agency announces unanticipated changes to existing law through "informal" means.[4] This case represents a perfect example of that danger. DOL replaced decades of settled, well-understood standards, relied upon by employers across the country, with new, unanticipated, and far more draconian standards. DOL's decision to forsake existing, relatively transparent, easily digested mechanisms for providing guidance and instead to rely on lower court *amicus* briefs to reverse course on existing compliance standards requires the Court to mark out even more clearly the limits of deference those briefs receive.

For these reasons, the Chamber urges the Court to grant review.

REASONS FOR GRANTING THE PETITION

I. THE UNCERTAINTY CREATED BY THE DECISION BELOW WITH RESPECT TO THE FLSA'S ADMINISTRATIVE EXEMPTION CAN ONLY BE CLARIFIED BY THIS COURT

The FLSA's "administrative" exemption applies broadly to individuals "whose primary duty is the performance of non-manual work directly related to the management or general business operations of the employer." 29 C.F.R. § 541.200(2) (2010). Nearly every FLSA-covered employer in the American economy has employees currently classified as exempt from the

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4. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007).

FLSA's overtime requirements under the administrative exemption. If the Second Circuit's understanding of that exemption is allowed to stand, nearly every such exemption determination will have to be reconsidered. This dramatic remaking of the exemption warrants this Court's review.

A. The Decision Below Undermines Settled Expectations Regarding The Administrative Exemption

The decision below creates one intra-circuit division of authority and deepens another. *See* Pet. at 20-24. Effectively, the Second Circuit declared that legal restrictions on sales in the pharmaceutical industry all but preclude Pharmaceutical Sales Representatives ("Sales Reps") from qualifying for the administrative exemption because they cannot exercise sufficient "discretion and judgment" in performing their primary duty,[5] when the Third Circuit held in *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010), on largely identical facts,[6] that they do qualify.

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5. For example, when describing the methods by which Sales Reps operate, the court observed that "[t]o market its pharmaceuticals, Novartis has a team of 'brand' managers who, cognizant of limitations imposed by the United States Food and Drug Administration ('FDA'), devise descriptions of the essential features of each Novartis drug .... Reps receive negative reviews if they deliver the[se] Novartis core message[s] in a way that violates FDA-imposed limitations or Novartis policies." Pet. App. at 4a, 7a.

6. *See* Pet. at 8-11.

More importantly to the Chamber's broader membership, however, the Court of Appeals embraced an idiosyncratic and potentially crippling construction of the administrative exemption. By rejecting decades of prior administrative guidance and court decisions, the court below has thrown into doubt the correctness of countless exemption decisions made by employers relying on that guidance.

Specifically, the court embraced uncritically this position urged by DOL:

> The Secretary takes the position that for the administrative exemption to apply to the Reps, the regulations require a showing of a *greater degree* of discretion, and *more authority* to use independent judgment in matters of significance, than Novartis allows the Reps. Again we find it appropriate to defer to the Secretary's interpretation.

Pet. App. at 33a (emphasis added).

This standard is both new and mistaken. First, the relevant regulation instructs employers (and the courts) to consider "*whether* [the] employee exercises discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.202(a) (2010) (emphasis added). The regulation thus asks a "*whether*" question — *whether* discretion and judgment are exercised — not a "how much" question. It directs a binary inquiry, *i.e.*, whether the employee at issue exercises some degree of discretion and independence, *not* a *quantitative* analysis into the extent to which they are exercised.

Indeed, as recently as 2004, DOL underscored the binary nature of this inquiry by expressly *refusing* during rulemaking to adopt a quantitative "'customarily and regularly' perform" standard for the exercise of discretion. The 2004 Rule was intended to "make the regulations easier to understand and decipher when applying them to factual situations." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,126 (Apr. 23, 2004). When it rejected this quantitative standard, DOL reaffirmed its longstanding view that the employee's duties need only "*include* the exercise of discretion." *Id.* at 22,142-22,143 (emphasis added).[7]

And the courts have followed that "whether" (and not a "how much") approach. Quite recently, for example, in *Robinson-Smith v. Government Employees Insurance Co.*,[8] the court considered whether auto damage adjusters qualified for the exemption. The court noted that although "the parties disagree on how much discretion the adjuster exercises, no one disputes that he exercises 'some.'" And because "some" is all the regulation requires, the court held the exemption applicable. *See also O'Dell v. Alyeska*

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7. Although the current regulation on the exercise of discretion and judgment — 29 C.F.R. § 541.202 — was substantially revised in 2004, the revision was expressly intended to "retain[] th[e] standard from the existing regulations [and] reflect existing federal case law" but also to "eliminate outdated and confusing language in the existing interpretive guidelines." 69 Fed. Reg. at 22,142. Thus, this current articulation of the standard was "intend[ed] [only to] clarify the existing standard and to make the standard easier to understand and apply to the 21st Century workplace." *Id.*

8. 590 F.3d 886, 893-94 (D.C. Cir. 2010).

Pipeline Serv. Co., 856 F.2d 1452, 1454 (9th Cir. 1988) (if district court had correctly applied administrative exemption, "it could only have come to the ultimate conclusion that [plaintiff] exercised *some* discretion and independent judgment during the course of his job, and therefore [he] was an exempt administrative employee.") (emphasis added).[9]

Given this well-understood construction, *even DOL* previously concluded that the work done by Sales Reps fits within the exemption. In 1945, DOL issued an opinion letter concerning medical "detailists" — the predecessor job title to Sales Rep. DOL explained that these detailists "increas[ed] the use of . . . product in hospitals and through physicians' recommendations" and cultivated relationships with doctors — precisely what Sales Reps do today. Based on these facts, DOL concluded that the detailists used "discretion and independent judgment," had "skills or knowledge acquired through special training or experience" and thus qualified for the exemption. *See* Wage and Hour Opinion Letter, *Applicability of Exemption for Administrative Employees to Medical Detailists*, [1943-48 Wages-Hours] Lab. L. Rep. (CCH) ¶ 33,093 (May 19, 1945); *see also Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883, 886 n.2 (E.D. Pa. 1982) (Sales Rep exempt; relying in part on 1945 opinion letter).

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9. Indeed, the Chamber is aware of no Circuit decision other than the one below which has applied DOL's new quantitative test; the Third Circuit's recent decision granting the administrative exemption to a Sales Rep in *Johnson & Johnson*, discussed *supra*, did not apply such a test. *See* 593 F.3d at 285.

The Second Circuit conceded below that the primary duty of Sales Reps *includes* work requiring discretion and judgment: they are "ab[le] to answer questions" the physicians ask, they "develop a rapport with [the] physician[s]," "remember past conversations" so that they can move toward a commitment to prescribe, and "recognize when a message has been persuasive." Pet. App. at 34a.[10] But the court never acknowledged the existence of the "detailist" opinion letter or DOL's longstanding rejection of a "how much" approach to the discretion and judgment question. Giving uncritical deference to DOL's *amicus* brief, the Second Circuit simply declared that it wanted to see "a *greater* degree of discretion, and *more* authority to use independent judgment" — "greater" and "more" by some unstated amount. Pet. App. at 33a (emphasis added).

B. The Second Circuit's Decision Threatens Employer Practices In Every Industry

Although on its face the Second Circuit's decision deals exclusively with Sales Reps in the pharmaceutical industry, the ramifications of this decision are far-reaching and profound for American business. Employers within the Second Circuit — and, presumably, those in any

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10. The Court of Appeals never defined the Sales Reps' "primary duty" with any degree of precision, but it did conclude that Novartis had failed to "show that the Reps are *sufficiently* allowed to exercise either discretion or independent judgment in the performance of their primary duties," Pet. App. at 35a (emphasis added), suggesting that the court understood that the discretionary duties relied upon by Novartis *were* part of the Sales Reps' primary duty.

circuit that can be persuaded to give the DOL's *amicus* brief in this case deference[11] — will have to reconsider every administrative exemption determination they have previously made, recalibrating each of those decisions in light of a quantitative test with no quantifiable standards, knowing only that the employer must show something "more" than Novartis did in this case.

Unlike some of the FLSA's exemptions, which apply to a fairly narrow range of jobs or a limited slice of the American economy,[12] the administrative exemption applies to employees in nearly every American workplace — a breathtaking array of work performed across the economy in nearly every kind of business. Here are a few examples:

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11. One court has already given DOL's *amicus* brief in *Novartis* deference, and reversed its decision on the exemption status of Sales Reps on a motion for reconsideration; another court declined to do so. *Compare Harris v. Auxilium Pharm., Inc.*, No. 4:07-cv-3938, 2010 WL 3817150, at *3 (S.D. Tex. Sept. 28, 2010) (reconsidering and reversing prior decision granting the outside salesperson and administrative exemptions to Sales Reps, based on DOL *amicus* brief in *Novartis*) *with Schaefer-Larose v. Eli Lilly & Co.*, No. 1:07-cv-1133-SEB-TAB, 2010 WL 3892464, at *1-2 (S.D. Ind. Sept. 29, 2010) (refusing to reconsider prior decision that Sales Reps "came within the outside salesperson and administrative exemptions to the overtime pay provisions found in the Fair Labor Standards Act").

12. *See, e.g.*, 29 U.S.C. § 213(a)(2) (certain amusement park employees); § 213(a)(5) (certain employees in shellfish industry); § 213(a)(10) (certain switchboard operators); § 213(a)(12) (certain seamen); § 213(a)(16) (certain criminal investigators).

- union organizers[13]
- first line supervisors in a nuclear power plant[14]
- customer service employees[15]
- event planners[16]
- public relations employees[17]
- a life insurance claims coordinator[18]
- a union vice president[19]

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13. *Savage v. UNITE HERE*, No. 05-10812(LTS)(DCF), 2008 WL 1790402, at *1 (S.D.N.Y. Apr. 17, 2008).

14. *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 372-75 (7th Cir. 2005).

15. *Haywood v. N. Am. Van Lines, Inc.*, 121 F.3d 1066, 1071-74 (7th Cir. 1997).

16. *Bondy v. City of Dall.*, No. 3:01-cv-1005, 2002 WL 31906344, at *4 (N.D. Tex. Dec. 30, 2002).

17. *Copas v. E. Bay Mun. Util. Dist.*, 61 F. Supp. 2d 1017, 1023-33 (N.D. Cal. 1999).

18 *E.g., McAllister v. Transamerica Occidental Life Ins. Co.*, 325 F.3d 997, 1000-02 (8th Cir. 2003).

19. *Douglas v. Argo-Tech Corp.*, 113 F.3d 67, 71-72 (6th Cir. 1997).

- a wireless telecommunications consulting executive[20]
- an office manager for an automobile dealership[21]
- a Director of Emergency Medical Services for a municipality[22]
- production planners in a shipyard[23]
- marketing representatives for a life insurance company[24] and
- a retail store manager[25]

Thus, if the decision below is not addressed by this Court, employers in every kind of business, in every

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20. *Darveau v. Detecon, Inc.*, 515 F.3d 334, 338-39 (4th Cir. 2008).

21. *Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326, 331-32 (5th Cir. 2000).

22. *Mayer v. Bd. of Cnty. Comm'rs of Chase Cnty.*, 5 F. Supp. 2d 914, 918-19 (D. Kan. 1998).

23. *Cowart v. Ingalls Shipbuilding, Inc.*, 213 F.3d 261, 267 (5th Cir. 2000).

24. *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 14 (1st Cir. 1997).

25. *Striker v. E. Off Road Equip.*, 935 F. Supp. 650, 656-59 (D. Md. 1996).

industry sector, and in every part of the country will have to reconsider patterns of FLSA compliance that have existed to the satisfaction of employers and employees alike for decades.

Moreover, this reevaluation would essentially be rudderless. All one can glean from DOL's *amicus* brief and from the decision below is that a quantitative analysis is now required — that the discretion and judgment inquiry has become a "how much" question rather than a "whether" question — and that something "more" than what Novartis presented in this case would be required to sustain the exemption. This effectively meaningless standard would leave even the most cautious, conscientious employer without any basis for confidently predicting how it might fare in a DOL investigation or in a lawsuit brought by employees.

One would have expected that, before DOL would embark on such a revolutionary revision to settled, successful patterns of FLSA compliance, it would have undertaken the sort of careful — and public — consideration of the consequences of such an action that is part and parcel of the Administrative Procedure Act's notice and comment rulemaking process. But in this instance, DOL announced this revolution in FLSA standards without public comment, in an unsolicited brief filed in a lower court proceeding to which the court below gave uncritical deference. Neither DOL nor the court below gave any apparent consideration to the new rule's far-reaching consequences. The Court should grant the petition in this case to give the changes this new rule portends the sort of careful consideration they deserve.

II. THE DECISION BELOW UPSETS DECADES OF SETTLED LAW ON THE MEANING OF THE WORD "SALE," CREATING UNCERTAINTY FOR EMPLOYERS

A. Congress Defined The Term "Sale" As Broadly As Possible

This case presents only one question insofar as the "outside sales" exemption is concerned: whether the respondents "sell" the company's drugs. Common, "dictionary" understandings of the term "sell" are irrelevant to that question, as Congress defined the words "sale" and "sell" in § 3(k) of the Act, 29 U.S.C. § 203(k), embracing an unmistakably sweeping, inclusive, and open-ended notion of the terms:

> "Sale" or "sell" *includes any* sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition.*

29 U.S.C. § 203(k) (2010) (emphasis added).

In this definition, Congress employed four different measures to ensure that the definition of "sale" would receive the broadest possible construction. First, it used the introductory term "includes." Congress thereby instructed the courts that some activities *not* listed would nonetheless qualify as sales.

Second, Congress used the word "any" to preface the list of activities it *did* provide as examples of statutory "sales." Congress thus wanted to ensure that, even with respect to each type of "sale" activity specified in its non-

exhaustive list, the definition would extend to not just *some* possible variants — *e.g.*, "sales" in the "prototypical" or "classic" or "dictionary" sense — but to "*any*" such form.

Third, Congress defined "sale" by referring to a series of disparate activities that would all qualify as "sales." By starting with the tautology "[s]ale . . . includes any sale," Congress plainly began its litany with precisely the sort of "actual sale" to which the Second Circuit thought the statute was limited. That is, the statutory definition *begins* by including the sort of prototypical "sales" that "involv[e] a transfer of title" to which the Second Circuit would confine the definition, Pet. App. at 25a, but goes on from there to list *other* activities — activities that are *not* "actual sales" but which are nonetheless included within the statutory definition, "includ[ing] *any*" other "exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."

Finally, Congress ended its non-exhaustive, illustrative list with the definitional phrase "or other disposition," a phrase that casts — and that must have been intended to cast — an exceptionally broad net. By doing so, it declared that the range of § 203(k)-qualifying activities would include activities that were *not* "actual sales" or fully "consummated transactions" in which ownership of or "title" to goods has been transferred. Rather, Congress manifestly intended to include within its definition activities that would *not* be a "sale, exchange, contract to sell, consignment for sale, [or] shipment for sale" but that nonetheless bear indicia of sales activity.

B. For 70 Years DOL And The Courts Have Eschewed Bright Line Standards Such As The One Adopted Below

Since 1940 and until quite recently, DOL had acknowledged that "the term 'sale' does *not* always have a fixed or invariable definition" — that there is no bright line standard for identifying what is and is not "sales" activity — and that "sale" must be defined contextually and in light of the totality of the circumstances presented. U.S. Dep't of Labor Wage and Hour Opinion Letter, FLSA 2005-6, 2005 WL 330605 (Jan. 7, 2005) (emphasis added). Thus, DOL had repeatedly and consistently directed employers and the courts to construe the word sale "in a practical" rather than a technical or restrictive manner.[26]

More specifically, forty years ago, DOL promulgated a regulation that implemented the expansive statutory language and made it perfectly clear what the agency believed was required for an individual to be "considered . . . 'selling'" as that term is defined in 29 U.S.C. § 203(k):

> As long as the employee *in any way participates* in the sale of the goods he will be considered to be "selling" [as defined by § 203(k)], whether he physically handles [the goods] or not. Thus, if [that] employee performs work that, *in a practical sense, is an essential part* of

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26. U.S. Dep't of Labor, Wage and Hour and Public Contracts Division, "Executive, Administrative, Professional, Outside Salesman Redefined, Report and Recommendation of the Presiding Officer at the Hearing Preliminary to Redefinition" (Oct. 10, 1940) ("1940 Report") at pp. 45-46.

> consummating the "sale" of particular goods, he will be considered to be "selling" the goods.

29 C.F.R. § 779.241 (1970) (emphasis added).

Thus, for decades, DOL has acknowledged that an employee engages in "sales" as defined by § 203(k) whenever the employer can demonstrate "that the employee, *in some sense*, has made sales." 69 Fed. Reg. at 22,162; *see also* 1940 Report at p. 46 ("salesman [must] in some sense make a sale"). The italics here — "*in some sense*" — come from DOL, which used them to emphasize that exemption-qualifying activity would include tasks that are like sales *in some ways*, but are *not* sales "*in every sense*" or in a narrow *prototypical* "sense."

Consider the work of the Sales Reps through this lens. Novartis hires individuals for a job denominated as a "sales" position and trains them in sales techniques. Pet. App. at 41a-43a. They are given sales territories that they are then expected to develop. *Id.* They educate customers about the advantages of their employer's products, "qualify" those customers to determine existing physician barriers to the use of those drugs, work to overcome those barriers through techniques of persuasion, and attempt to "close" each sales call, ultimately seeking a commitment from the physician to prescribe those drugs for patients who will benefit. They do so because, to a substantial degree, Sales Rep compensation is determined by success in increasing the rate at which the physicians in their territory prescribe Novartis drugs.

Given these undisputed facts, Sales Reps unquestionably do work that is, "*in some sense*," sales

work. Indeed, in *nearly every sense*, this is "sales" work. *Only one* aspect of this process distinguishes the Sales Rep's work from that of other exemption-qualifying outside salespersons: Novartis Sales Reps are prohibited by federal law from calling on the ultimate consumer, and the sales order — the prescription — is generally redeemed at the pharmacy, not in the doctor's office. When a Sales Rep makes her sale, no money changes hands at that point in the process.

Sales Reps are trained as salespersons, and perform jobs that are, in nearly every respect, sales jobs. And given the breadth of the statutory definition and DOL's regulatory guidance, it is not surprising that pharmaceutical manufacturers have for decades uniformly classified their Sales Reps as exempt outside sales persons. And for decades, DOL never challenged — or even questioned — this industry-wide practice.

C. The Standard Adopted Below Undermines 70 Years Of Settled Expectations

DOL and the Second Circuit together have overturned this unbroken, decades-long settled practice. On the precise question posed here — whether Sales Reps are prevented from engaging in statutory "sales" because federal law prohibits them from personally consummating a transaction that results in a transfer of title — there is no division of authority among the circuits. Waiting for such a split to develop, however, would likely be futile. It seems almost certain that every pharmaceutical company doing business in the United States can be sued somewhere in the Second Circuit. It seems just as certain that, with the new standards announced below, plaintiffs are unlikely to

pursue these claims against these employers anywhere else. Thus, the Second Circuit's decision seems destined to become the nominal national standard if not addressed by this Court.

For the first time, DOL insisted, and giving uncritical deference, the Second Circuit held, that "a 'sale' [by a Sales Rep would] require[] a *consummated* transaction *directly* involving the employee" at issue.[27] As the Second Circuit put it, the Sales Reps at issue here did not "sell" within the meaning of § 203(k) because they themselves "cannot transfer ownership of any quantity of the drug in exchange for anything of value."[28] As the Secretary would have it, no Rep "consummate[s]" *his or her own specific* "'sale'" and thus they cannot qualify for the exemption.[29] This is incompatible with § 799.241's more flexible standard, which requires only that the employee *in some way participate* in the sale of the goods to be considered to be "selling."

The difference between the historic context-dependent and flexible understanding of "sale" and this entirely new, mechanistic formulation could hardly be clearer. Before, under existing regulatory and statutory standards, an individual was "selling" within the meaning of the FLSA if he or she "perform[ed] work that, *in a practical sense*, [plays any] essential *part* of consummating the 'sale' of particular goods"; under the new standard urged by DOL and adopted below, "a 'sale' [by a Sales Rep would]

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27. Pet. App. at 167a (emphasis added).

28. *Id.* at 27a.

29. *Id.* at 167a.

require[] a *consummated* transaction *directly* involving the employee" at issue.

More fundamentally, the decision below adopts precisely the sort of bright line standard DOL has previously rejected: § 203(k)-qualifying sales occur only when the individual in question *transfers title* to the goods involved to the purchaser. Pet. App. at 27a. But the statute expressly includes within the definition of "sale" a "consignment for sale," in which by definition no transfer of title occurs. Because the statute expressly contemplates transactions in which title does *not* transfer, several circuits have concluded, *e.g.*, that *leases* of various sorts qualify as "sales."[30] These holdings cannot be reconciled with the decision below.

D. The Construction Of "Sale" Adopted Below Will Have Profound Implications For Employers And Employees Beyond The Pharmaceutical Industry

The Second Circuit's departure from the long-understood application of § 203(k) threatens to make unlawful a sales structure in the pharmaceutical industry

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30. *See, e.g.*, *Brennan v. Dillion*, 483 F.2d 1334, 1337 (10th Cir. 1973) (leasing apartment space was "sell[ing]" under § 203(k)); *Montalvo v. Tower Life Bldg.*, 426 F.2d 1135, 1141-42 (5th Cir. 1970) (rejecting argument that renewal payments on existing insurance policies were not "sales" because there was no "new" transaction; dubbing such arguments a "hypertechnical approach to the buying and selling of insurance protection which is totally unwarranted by economic reality" under § 203(k)).

that has existed for decades without challenge from DOL[31] or, for that matter, serious court challenges by private plaintiffs. That sort of upheaval in such an important sector of the American economy would, itself, justify issuing the writ.

But DOL's revisionist approach to § 203(k) will have ramifications far beyond the pharmaceutical industry. The word "sale" and its various permutations are used no fewer than 37 times in the FLSA in a wide variety of contexts, and thus the Second Circuit's new construction of that term cannot be easily cabined.[32] For example, in 29 U.S.C. § 215(a)(1), Congress made it unlawful for "any person . . . to . . . sell" or to deliver goods "sold" in violation of the Act's minimum wage or overtime provisions. Applying the Second Circuit's constricted definition of the word "sale" in this context would limit the scope of the FLSA's protections, *excluding* from coverage a large number of employees who are currently covered.

Similarly, if the Second Circuit's construction of the term "sale" were used everywhere it appears in the FLSA, it would *remove* many employers from coverage — and thus many *employees* from the Act's protections — because coverage often depends on the employer reaching

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31. *See Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510-11 (7th Cir. 2007) (Posner, J.) (while it is "possible for an entire industry to be in violation of the Fair Labor Standards Act for a long time without the Labor Department noticing[, the] more plausible hypothesis is that the . . . industry has been left alone" because DOL considered its practices lawful).

32. "Sale" (or its variants) appears only once in the statutory exemption and five times in § 203(k) itself.

a certain minimum levels of "sales." *See, e.g.*, 29 U.S.C. § 207(b)(3) (2010) (establishing coverage threshold by certain "sales" figures).

DOL urged the Second Circuit to consider the reach of the term "sale" solely in the "context" of the exemption which, the Secretary contended, required a "narrow construction." The court below obliged by ignoring the possible ramifications its construction of § 203(k) might have in other contexts. *See* Pet. App. at 25a-26a (construing the term "sale" only within the "outside sales" exemption context).

But Congress precluded such an inconsistent result in the statute's text when it declared that all definitions in Section 203 were to be applied uniformly wherever the defined terms appeared "in this chapter" (*i.e.*, the FLSA). 29 U.S.C. § 203 (2010). Even if Congress had not said so, this Court has instructed the lower courts to presume that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986) (citation omitted).

By adopting this mechanistic construction of the word "sale," the opinion below threatens to destabilize the operations of a critical industry. More broadly, it draws into question the reasonable expectations of employers (who have established practices that will be undermined by the ruling) *and employees* (who could lose FLSA coverage as a result) in nearly every sector of the American economy. It introduces uncertainty into questions of FLSA coverage and administration that employers and employees have long considered settled. The Second Circuit did not acknowledge that its opinion

had implications beyond the pharmaceutical industry or the outside sales exemption, and apparently did not consider how the use of that statutorily defined term *outside* of the exemption context reflects Congress's intent in adopting the broad definition it wrote. The court thus erred, and that error will have profound implications beyond the pharmaceutical industry.

III. CERTIORARI IS WARRANTED TO CLARIFY AND REINFORCE CURRENT LIMITATIONS ON *AUER* DEFERENCE

In *Auer v. Robbins*, 519 U.S. 452 (1997), this Court solicited a brief *amicus curiae* from the Secretary of Labor regarding proper application of a DOL regulation interpreting the FLSA's "salary basis" test. The Court gave deference to the resulting brief, concluding that an agency's views about its own regulations do not necessarily become "unworthy of deference" simply because they are expressed in an *amicus* brief. Given that the brief was solicited by the Court and filed by the Acting Solicitor General of the United States and the Acting Solicitor of Labor, the Court saw no reason to doubt that the brief "reflect[ed] the agency's fair and considered judgment on the matter in question." *Id.* at 462.

The *amicus* brief at issue in this case bears none of the indicia of a "fair and considered judgment" so evident in *Auer*. As explained above, with respect to each exemption, DOL's *amicus* brief disregards settled expectations, ignores the agency's own prior and existing regulatory guidance, and embarks on entirely new and unprecedented revisions of key aspects of the Act. While an agency is entitled to change its view about an existing

regulation and can dispense with long-established guidance, it seems impossible to characterize such an effort as "fair and considered" when the vehicle in which the new standard is articulated — here an *amicus* brief — does not mention, much less grapple with, the agency's traditional approach. It is not enough to *suppose* that the agency has given the matter some thought; the brief or rulemaking that announces the change of direction must explicitly "articulate a satisfactory explanation for [the agency's] action including a rational connection between the facts found and the choice made." *Cf. Motor Vehicles Mfrs. Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 43 (1983) (notice and comment case).

The unquestioning deference the *amicus* brief earned in this case is of particular concern to Chamber members because DOL has recently eliminated its long-standing practice of issuing opinion letters to provide guidance to the regulated community on FLSA compliance.[33] Apparently to replace this easily accessed, organized, and understood source of information, *inter alia*, the Solicitor of Labor is reported to have recently told an audience of lawyers representing employees in litigation that she intends to "reinvigorate" DOL's use of *amicus* briefs, and she openly solicited the audience for cases in which DOL might file.[34]

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33. *See* Wage & Hour Division, Rulings and Interpretations, *available at* http://www.dol.gov/WHD/opinion/opinion.htm#AdmIntprt (last visited Nov. 3, 2010).

34. Richard Renner, *Solicitor of Labor Patricia Smith Speaks Out About Policy*, Whistleblowers Protection Blog (posted June 25, 2010), *available at* http://www.whistleblowersblog.org/2010/06/

(Cont'd)

It seems inconceivable that employers can be expected to follow the activities of DOL in countless pieces of litigation around the country and accommodate their practices to new normative standards announced in any briefs DOL may file. In *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), the Court recognized that unanticipated, informal agency interpretations can pose significant risks to the regulated community, and cautioned that deference is appropriate only "as long as interpretive changes create no unfair surprise." *Id.* at 170. In this instance, DOL has attempted to undo existing guidance without even acknowledging that prior guidance exists, using a brief that purports to establish normative standards binding on countless employers who do not routinely follow the dockets of the lower courts.

There are mechanisms available to the Secretary to reverse course on existing regulations and retract guidance that has been the basis of reliance by the regulated community for decades. DOL's attempt to do so in a lower court *amicus* brief, without public involvement, and without acknowledging its own prior guidance on the issue is not a permissible vehicle for such an effort. Rather, it represents the prototypical "unfair surprise" about which the Court warned in *Coke*. The Court should grant the petition to ensure that existing guidelines for the application of *Auer* deference are more clearly defined.

(Cont'd)
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CONCLUSION

The petition should be granted.

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No. 10-460

In the
Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,
PETITIONER,

v.

SIMONA M. LOPES, CATHERINE E. WHITE, ET AL.,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA (PhRMA) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. *See* http://www.phrma.org/member_company_list (listing approximately 40 members, affiliates, and research associates). PhRMA's mission is to advocate in support of public policies that encourage the discovery of life-saving and life-enhancing new medicines for patients by pharmaceutical and biotechnology research companies.

PhRMA closely monitors legal issues that impact the pharmaceutical industry. To that end, PhRMA has frequently participated in cases before this Court. *See, e.g., Astra USA, Inc. v. Cty. of Santa Clara*, 131 S. Ct. __ (2011) (No. 09-1273); *Merck & Co., Inc v. Reynolds*, 130 S. Ct. 1784 (2010) (No. 08-905).

The decision below has potentially far-reaching ramifications for the pharmaceutical industry. By holding that Novartis's pharmaceutical sales representatives ("sales representatives") are not exempt from the Fair Labor Standards Act's

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[1] The parties have consented to the filing of this brief. The parties' counsel have received 10-day notice of *amicus curiae*'s intention to file pursuant to Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

overtime pay requirements, the decision unexpectedly exposes PhRMA members to potentially staggering retroactive liability from lawsuits by current and former employees. Moreover, unless reversed, the decision could require major restructuring that would have significant consequences for sales representatives, the industry, health care professionals, and patients. Worse, these serious consequences loom because of nothing more than an unexplained (and unpersuasive) change in the Department of Labor's interpretation of its regulations announced for the first time in an *amicus* brief. Rather than leave this important industry at sea, this Court should grant certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

Throughout the 70 years since the enactment of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, pharmaceutical companies have employed large numbers of sales representatives, and the settled understanding has been that those employees are exempt from overtime pay under the FLSA's "outside sales" and "administrative" employee exemptions. That view was based on an unbroken line of authority beginning with the Department of Labor's initial regulations in 1940 through to its recent reaffirmations in its 2004 rulemaking.

The current Administration, however, has apparently decided to reverse this long-settled issue. Rather than initiate a rulemaking to consider prospective changes and allow interested parties to participate, the Department simply filed an *amicus* brief below announcing its new position that sales

representatives are not exempt and never have been. To make matters worse, the Department's *amicus* brief failed entirely to acknowledge the Department's change in position, let alone grapple with contrary authority and justify a change that upsets such well-settled expectations. The Second Circuit nonetheless held that the *amicus* brief was entitled to "controlling" deference under *Auer v. Robbins*, 519 U.S. 452 (1997), and accepted uncritically the Department's new interpretations of the exemptions, giving them retroactive effect.

The Second Circuit's extreme application of *Auer* deference necessitates this Court's review. The *Auer* line of cases has generated confusion, as lower courts have wrestled with whether an agency's change in position vitiates or lessens the deference due. But whatever the open questions from this Court's precedents or divisions among the lower courts, the fundamental error of the decision below is plain: In focusing only on the Department's interpretations "on this appeal," and turning a blind eye to the dramatic change in position that the interpretations reflect, the Second Circuit allowed the Department to undo regulations promulgated through notice-and-comment rulemaking and engineer a revolution in FLSA jurisprudence via the expedient of an unsolicited *amicus* brief.

The Second Circuit's misplaced *Auer* deference drove its erroneous holdings as to each FLSA exemption. But for its deference to the Department's newly-minted interpretation of the "outside sales" exemption, the Second Circuit could not have found Novartis's sales representatives to be non-exempt. Since 1940, the regulations have embodied a functional approach under which an "outside sales"

employee need only make sales "in some sense." That approach cannot be reconciled with the Department's new wooden insistence on an actual transfer of title personally effected by the employee at issue. Novartis's "sales representatives" do engage in sales "in some sense" — in the only sense possible given the regulatory constraints on drugs' marketing and distribution. Those regulatory constraints, moreover, have nothing to do with the purposes of the FLSA and cannot obscure the reality that sales representatives do sales work — as recognized by the Department's own Bureau of Labor Statistics.

Likewise, but for its deference to the Department's new construction of the "administrative" exemption, the Second Circuit could not have found Novartis's sales representatives to be non-exempt under that exemption. Until its *amicus* brief, the Department's position was that an exempt employee need only have a primary duty that "includes" discretion, and need not "customarily and regularly" exercise discretion or meet a threshold level of discretion. Under that traditional position as reflected in the existing regulations, Novartis's sales representatives are plainly exempt. It would turn administrative law on its head if an *amicus* brief could reverse that notice-and-comment-promulgated judgment.

The proper scope of deference to an agency's interpretation of its regulations is an important question meriting certiorari in its own right. The decision below, however, raises a particularly acute need for review because of its immediate practical impact. In addition to threatening massive unforeseen liability, the decision below creates

rampant uncertainty concerning longstanding sales practices. Biopharmaceutical companies in all likelihood will not be able to simply switch to treating sales representatives as non-exempt while keeping everything else about their jobs unchanged. Such a shift, moreover, may have broader ramifications for how prescription drug information is disseminated to medical professionals. Before companies in such a large and important industry face the potential need to restructure their operations, this Court should determine whether the Second Circuit correctly held Novartis's sales representatives to be non-exempt.

ARGUMENT

I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW ERRONEOUSLY APPLIES *AUER* DEFERENCE.

A. There Is Uncertainty Among The Circuits Over The Extent To Which Changes In Position Undermine *Auer* Deference.

In *Auer*, this Court held that an agency's interpretation of its own ambiguous regulations was entitled to "controlling" deference unless that interpretation was "'plainly erroneous or inconsistent with the regulation.'" 519 U.S. at 911. The agency, having written the regulation, was well-positioned to say what it meant. *See Bowles v. Seminole Rock*, 325 U.S. 410, 413-14 (1945). But this Court also signaled limits to that deference: In explaining why the Secretary of Labor's interpretation was worthy of deference despite being advanced in an *amicus* brief, the Court noted that there was "no reason to suspect that the interpretation d[id] not reflect the agency's

fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462 (emphasis added). Lower courts since have wrestled with what a "fair and considered" agency judgment entails. In particular, they have grappled with whether an agency's change in position about the meaning of its regulations vitiates or lessens deference under *Auer*.

The D.C. Circuit and Federal Circuit have held that a "fair and considered" agency position should be one consistent with prior interpretations. The D.C. Circuit holds that whether an interpretation is "fair and considered" turns on whether the agency has "'ever adopted a different interpretation of the regulation or contradicted its position on appeal.'" *Drake v. Fed. Aviation Admin.*, 291 F.3d 59, 68 (D.C. Cir. 2002). The Federal Circuit likewise has observed that an interpretation "'that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view.'" *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 837 (Fed. Cir. 2006). The Second Circuit appeared to take the same view until this case. *See Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 264 (2d Cir. 2006) (where interpretation is "inconsistent with the government's prior interpretations of the regulation ... the 'substantial deference' that we normally accord the [agency's] interpretation of its own regulations[] is not appropriate").

These courts have reasoned that this Court's precedents compel this focus on consistency. In *Watt v. Alaska*, 451 U.S. 259 (1981), for example, this Court held that the Department of the Interior's "current interpretation" of certain legislative amendments was "entitled to considerably less deference" because it "conflict[ed] with its initial

position." *Id.* at 273; *accord Gose*, 451 F.3d at 837. In *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987), this Court similarly held that the "inconsistency of the positions" the Board of Immigration Appeals had "taken through the years" militated against deferring to its latest statutory interpretation. *Id.* at 446 n.30. Moreover, in *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994), this Court stated that deference to an agency's interpretation of its regulations dissipates if there were "'other indications of the Secretary's intent at the time of the regulation's promulgation.'" *Id.* at 512 (citation omitted); *accord Gose*, 451 F.3d at 838. Accordingly, these courts are appropriately wary of "flip-flops" in the agency's position. *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000). And they demand that an agency, though not barred from changing its mind, at least acknowledge and offer a reasoned analysis of the change. *See, e.g., id.* (Secretary has "never grappled with—and thus never exercised her judgment over—the conundrum posed by the regulation[]").

Other courts have been less explicit in describing consistency as a precondition to *Auer* deference. But they have noted the consistency (or not) of an agency's interpretation in justifying decisions to defer (or not) to the agency's interpretation. *See, e.g., Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 777 (5th Cir. 2010); *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 461 (4th Cir. 2007); *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 567 (1st Cir. 2004); *United States v. Occidental Chem. Corp.* 200 F.3d 143, 152 n.11 (3d Cir. 1999). In *Taylor*, the Fourth Circuit declined to defer to the Department of

Labor's new *amicus*-brief interpretation because it was "inconsistent with what the DOL said it intended the regulation to mean at the time it was promulgated." *Taylor*, 493 F.3d at 461; *cf. id.* at 464 (Duncan, J., dissenting) ("I am ... unpersuaded by any suggestion that the inconsistencies in the DOL's interpretation of the regulation over time must lessen the level of deference").

The Ninth Circuit, meanwhile, has held that inconsistency does *not* vitiate deference to the agency as long as the change in position causes no "unfair surprise." In *Boose v. Tri-County Metropolitan Transportation District*, 587 F.3d 997 (9th Cir. 2009), the Ninth Circuit acknowledged that the Department of Transportation "ha[d] changed its views ... over the years," but emphasized that change alone was not a "'ground for disregarding [its] present interpretation.'" *Id.* at 1005 n.13. Citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007), in which this Court deferred to an agency's changed interpretation only after noting that it was not an "unfair surprise" because it had been announced in a proposed rulemaking, the Ninth Circuit explained that the touchstone was not a change in position by itself, but rather whether the change created "unfair surprise." And as in *Coke*, there was "'no unfair surprise'" because the Department had begun a rulemaking to "'codify its new interpretation.'" *Boose*, 587 F.3d at 1005 n.13. Under the Ninth Circuit's approach, then, inconsistent prior interpretations do not necessarily defeat deference, but courts must be vigilant against agencies seeking to bypass the rulemaking process by creating a new regulation in the guise of interpreting the existing one. This Court has

emphasized that when an agency changes position through a more formal process, it must acknowledge the change and account for reliance interests. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009). *A fortiori*, an agency may not use a mere *amicus* brief to work unfair surprise in a situation like this where reliance interests are at their apex.

The decision below went well beyond any existing authority. The Second Circuit deferred uncritically without addressing the abrupt shift effected by the Department's *amicus* brief or why the court could be confident that the brief reflected the Secretary's "fair and considered" judgment. Although Novartis had traced the Secretary's contrary positions as far back as 1940, neither the Department nor the court grappled with the problem of unfair surprise. By treating everything but the "position taken by the Secretary *on this appeal*" as irrelevant, the decision below took the Second Circuit into uncharted territory. App. 25a (emphasis added).

B. The Second Circuit Compounded Its Error By Deferring To A New Agency Position Stated For The First Time In An *Amicus* Brief.

The Second Circuit's deference to the agency's changed position conflicts not only with the approach of other circuits, but with this Court's own precedents. Whatever the precise limits of *Auer* deference, this Court has made clear that agencies cannot use *Auer* to circumvent the rulemaking process. Thus, in *Coke*, when the Court held that the agency's changing views did not vitiate deference, its rationale was that the Department of Labor's

"recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation makes any [unfair] surprise unlikely." 551 U.S. at 170-71; *see also id.* at 163 (Department had considered rulemaking changes on "three separate occasions during the past 15 years"). Similarly, in *Christensen v. Harris County*, 529 U.S. 576 (2000), this Court cautioned against deferring to an interpretation in an informal opinion letter because it would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* at 588. In his concurrence, Justice Souter made explicit the relationship between *Chevron* deference, which permits an agency to change its position on statutory interpretation issues by changing its regulation through rulemaking procedures, and *Auer* deference, which presupposes that the agency is genuinely interpreting its existing regulation. *See id.* at 589 (Department could "issue regulations" to reach the result the Court rejected under existing regulations).

The Department not only introduced its new interpretations in an *amicus* brief rather than a rulemaking, but its *amicus* brief broke from 2004 regulations that the agency *did* promulgate through rulemaking — indeed, after two decades' worth of input from interested parties. *Cf.* Br. of United States, *Kasten v. Saint-Gobain Performance Plastics Corp.* (No. 09-834), at 31 (seeking deference to Secretary of Labor's statutory interpretation on ground that it was not mere litigating position but rather reflected "half-century" of consistent "administrative practice"). Because the amicus briefs interpretations sharply depart from the 2004 regulations, the Second Circuit's deference

improperly allowed the Secretary to create new rules under the guise of interpreting existing ones. *See Mich. Bell Tel. Co. v. Covad Commc'ns Co.*, 597 F.3d 370, 375 n.6 (6th Cir. 2010) (*Auer* deference "unavailing" because "FCC has attempted to create a new *de facto* regulation under the guise of interpreting the regulation"); *see also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1997); *Boose*, 587 F.3d at 997 n.13.

The problem of unfair surprise is even more acute given the Department's broader move away from a system of meaningful, advance guidance. The Department for decades issued opinion letters offering advance FLSA guidance so employers could conform their conduct to the Department's view of the law and avoid retrospective liability. In March 2010, the Department abandoned this practice, shifting to issuing general legal interpretations "applicable across-the-board" to a given industry.[2] Because of their generality, these new interpretations are likely to provide less meaningful guidance. And courts have already noted that recent interpretations have "brought into question" earlier opinion letters. *See, e.g., Henry v. Quicken Loans, Inc.*, No. 04-cv-40346 (E.D. Mich. Sept. 27, 2010) (order requesting DOL *amicus* brief to clarify impact of a new interpretation). To make matters worse, the Department appears to have abandoned its

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[2] *See* Dep't of Labor, Wage and Hour Division, *Rulings and Interpretations*, http://www.dol.gov/WHD/opinion/opinion.htm#AdmIntprt.

opinion-letter practice in favor of "reinvigorat[ing]" its *amicus*-brief practice.[3]

If the Department sought to affect the application of an exemption by promulgating new regulations, its new rules would apply prospectively only. *See Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 369 (7th Cir. 2005). By bypassing rulemaking and ending its opinion-letter practice, the Department leaves employers unable to obtain meaningful guidance — until after the employer has been sued, when the Department files an *amicus* brief arguing for retroactive liability and controlling deference. Leaving the Second Circuit's *Auer* error uncorrected would encourage what appears to be the Department's move towards a system of ambush-by-*amicus*-brief.

C. The Second Circuit's *Auer* Deference Error Drove Its Decision On Both Exemptions.

The Second Circuit's "'controlling' deference" to the Department's interpretations warrants this Court's review because that deference undergirds its problematic and expectation-upsetting decision. App. 17a.

As to the "outside sales" exemption, the Second Circuit premised its analysis on *Auer's* deferential standard — "'controlling' deference unless th[e] interpretations are 'plainly erroneous or inconsistent

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[3] *See* Richard Renner, *Solicitor of Labor Patricia Smith Speaks About Policy*, http://www.whistleblowersblog.org/2010/06/articles/department-of-labor-1/solicitor-of-labor-patricia-smith-speaks-about-policy/ (June 25, 2010).

with the regulation.'" App. 25a; *see also id.* ("We find no such inconsistency and see no such error."). The court found Novartis's sales representatives non-exempt only by limiting "sales" to reflect the Department's technical insistence on an actual, personal transfer of title. And the court dismissed contrary case law holding sales representatives exempt only by stating that those cases "do[] not persuade us that *the Secretary's interpretations* of the regulations should be disregarded." App. 29a (emphasis added). Likewise, as to the "administrative" exemption, the Second Circuit found Novartis's sales representatives non-exempt only by deferring to the Department's view that "a greater degree of discretion ... than Novartis allows" is required. App. 33a. Indeed, the court acknowledged that Novartis's sales representatives have discretion over "what order to visit physicians' offices," "how best to gain access," "how to allocate their Novartis budgets for promotional events," and "how to allocate their samples." App. 35a. Only by deferring to the Department's insistence on some threshold quantity of discretion, then, could it conclude that such discretion was not "sufficient[]." *Id.*

Thus, while the Second Circuit did not discuss *Auer* at length or address the divergence of authority concerning *Auer*'s application in the face of a changed agency interpretation, its application of *Auer* deference drove the entire decision.

1. The Second Circuit Erred In Deferring To The Department's New Interpretation Of The "Outside Sales" Exemption.

The Department's newly restrictive definition of "sale" requires that the employee actually and personally transfer title. *See* App. 166a-167a & n.14. The decision below ignored the unfair surprise caused by the Department's adoption of that position at this late date. By focusing solely on the Department's position "on this appeal," App. 25a-26a, the Second Circuit did not grapple with the Department's abandonment of the flexible, functional understanding of "sale" that it had espoused for decades.

In 1940, the Department promulgated regulations making clear that an "outside salesman" under the exemption is one "who is customarily and regularly engaged away from his employer's place or places of business in making sales within the meaning of section 3(k) of the Act." 29 C.F.R. § 541.5 (1940). Section 3(k), in turn, defined "sale" in flexible and expansive terms to "*include*[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition*." 29 U.S.C. § 203(k) (emphases added). The Department underscored this non-technical approach by explaining that a "salesman [must] *in some sense* make a sale." Dep't of Labor, *Executive, Administrative, Professional, Outside Salesman Redefined* (Oct. 10, 1940) ("Stein Report") at 45-46 (emphasis added). Nothing in the regulatory or statutory language hinted at the hypertechnical reading now pressed by the Department.

In 1970, the Department reiterated this flexible understanding when it promulgated 29 C.F.R. § 779.241, entitled "Selling." Although § 779.241 appears in regulations discussing retailers, it interprets "[t]he statutory definition of the term 'sale' or 'sell' ... quoted in § 779.15" — namely, 29 U.S.C § 203(k), the precise statutory definition at issue here. In interpreting that statutory definition of "sale" — "includ[ing] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition" — the Department took a broad and explicitly practical approach that is the polar opposite of its *amicus*-brief interpretation:

> As long as the employee *in any way participates* in the sale of the goods he will be considered to be "selling" the goods, whether he physically handles them or not. Thus, if the employee performs any work that, *in a practical sense* is an essential *part* of consummating the "sale" of the particular goods, he will be considered to be "selling" the goods.

29 C.F.R. § 779.241 (emphases added). Congress provided that definitions in § 203 would apply uniformly throughout the FLSA. *See* 29 U.S.C. § 203 ("Definitions ... [a]s used in this chapter"). But the Department's *amicus* brief did not even acknowledge, much less successfully explain away, this expansive understanding of a "sale" in its own still-extant regulation.

Next, in its 2004 rulemaking, the Department emphasized that it "did not intend any substantive changes." Dep't of Labor, Preamble, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and*

Computer Employees (Apr. 23, 2004), 69 Fed. Reg. 22122, 22,161-22,162. The Department did not alter the definition of "sale." Indeed, the Department explicitly reaffirmed the statement in the 1940 *Stein* Report that all that is required for the exemption to apply is that the employee "'*in some sense* make a sale.'" *Id.* at 22,162 (emphasis in original).

Based on that expansive understanding, courts have long found transactions that do not involve actual, personal transfers of title to qualify. *See* Pet. 26 (citing cases). In *Gregory v. First Title of America, Inc.*, 555 F.3d 1300 (11th Cir. 2009), for example, the Eleventh Circuit held that a title marketing employee fell within the "outside sales" exemption. The plaintiff argued that she "never actually consummated a sale," that she was tasked only with "inducing" realtors and brokers to refer their customers who were the actual "end user[s]," and that she was not licensed to "directly s[ell]" to any end-user. *Id.* at 1303. But the Eleventh Circuit reasoned that the plaintiff was not "'paving the way' for others to consummate the sale"; she functioned as the "conduit through which orders for services flowed" in the industry and "received credit and payment for those orders that flowed through her." *Id.* at 1309.

Likewise, the pharmaceutical industry for decades has treated sales representatives as exempt outside salespersons. To be sure, industry practice does not establish the law. But it strains credulity to imagine that the industry uniformly misread the regulations and yet the Department never said anything, in any manner, to suggest it disagreed at any point over 70 years. As Judge Posner explained for the Seventh Circuit, while it is "possible for an

entire industry to be in violation of the Fair Labor Standards Act for a long time without the Labor Department noticing," the "more plausible hypothesis is that the ... industry has been left alone" because it was compliant. *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510-11 (7th Cir. 2007).

The Department seeks to analogize sales representatives to promoters or merchandisers who interact with customers but pave the way for sales to be made by others. App. 166a-167a; *see also* 29 C.F.R. § 541.503(c) ("promotional work that is incidental to sales made, or to be made, *by someone else* is not exempt outside sales work"). The analogy fails, however, because sales representatives do not pave the way for other salespersons. It is one thing to say that a merchandiser who does advance promotion to lay the groundwork for an outside salesperson is not himself an outside salesperson. *Cf. Skipper v. Superior Dairies, Inc.*, 512 F.2d 409, 414-16 (5th Cir.1975). But it is quite another thing to deny that pharmaceutical sales representatives make sales in any sense. The former suggests that not everyone involved in the sales process is a salesperson for purposes of the FLSA. The latter means that an industry that employs tens of thousands of individuals who always have been viewed as sales representatives has been magically deemed to have no "salespersons" at all.

The Department's new position defies the reality of how and why sales representatives operate the way they do. The mechanics of how prescription drugs are shipped and paid for have everything to do with FDA regulations and nothing to do with the purposes of the FLSA's overtime requirements — "'to

apply financial pressure to 'spread employment'" and "combat 'labor conditions detrimental to the maintenance of the minimum standard of living'" for workers' health and well-being. App. 19a, 45a; *see* App. 29a (sales representatives "cannot lawfully transfer ownership of any quantity of the drug" to doctors). That is presumably why neither the Department nor the Second Circuit even attempted to articulate a *reason*, grounded in the FLSA, why it would make sense to classify sales representatives as non-exempt on this technical ground.

Worse, the Department upended decades-long understandings without so much as acknowledging the change, its definition of "selling" in § 779.241, or contrary case law. Indeed, the *amicus* brief did not even acknowledge the Department's "in some sense" language evidencing its functional approach dating back to 1940. If the Department wishes to adopt this new hypertechnical definition of "sale," it could notify regulated actors of a proposed rulemaking, consider their comments, and then seek to justify prospective application of the resulting rule under *Chevron*. What the Department cannot do is purport to interpret its existing regulations to reach that result under *Auer* with the consequence that an entire industry loses an exemption retroactively.[4]

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[4] Even if *Auer* deference applied despite the Department's stark and unacknowledged change in position, the Department's new interpretation would fail under *Auer* itself. Requiring an actual, personal transfer of title is not only plainly contrary to prior interpretations, but also plainly contrary to the regulations themselves. The regulations' expansive and practical definitions of "sale" and "selling" in §§ 541.5 and 779.241 establish that, as the 2004 rulemaking reaffirmed, an

2. The Second Circuit Erred In Deferring To The Department's New Interpretation Of The "Administrative" Exemption.

The Department's new definition of "administrative" work similarly marks a sharp and unacknowledged break with its longstanding interpretation. The Department's actual regulation does not suggest that any particular quantum of discretion is required. It merely states that an employee is exempt if his "primary duty *includes* the exercise of discretion" — not that his primary duty must uniformly or routinely demand discretion, or that he must exercise discretion in some undefined proportion of work tasks. 29 C.F.R. § 541.200(a)(3) (emphasis added). In accordance with that plain language, the Department's longstanding position had been that only "some" discretion was required. The Department's *amicus* brief, however, contended that "some" discretion is not enough, that a higher (and undefined) quantum of discretion is required, and that Novartis's sales representatives do not exercise "sufficient[]" discretion to meet that threshold. App. 35a; *see also* App. 178a. The Second Circuit erred by deferring to that new interpretation and thus allowing an *amicus* brief to trump decades of consistently-stated regulatory views.

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employee need only "'*in some sense* make a sale.'" 69 Fed. Reg. at 22,162; *see also id.* ("Employees have a primary duty of making sales if they 'obtain a commitment to buy' from the customer and are credited with the sale."). The Department's new position that only an actual transfer of title suffices contradicts that plain text and could not survive even the most deferential review.

In 1940, the Department adopted regulations broadly defining "administrative" employees to cover any persons earning over $200 monthly whose work involved "the execution under only general supervision of special non-manual assignments ... involving the exercise of discretion and independent judgment." 29 C.F.R. § 541.2 (1940). The Department established that only minimal "discretion and independent judgment" was required. *See* Pet. 5-6; Stein Report at 26. In 1945, the Department issued an opinion letter declaring medical "detailists" to be exempt "administrative" employees. *See* Dep't of Labor, Wage and Hour Opinion (May 19, 1945), *available at* Lab. L. Rep. (CCH), Wage and Hour, v.1, ¶ 25,210.41. Describing the detailists' duties as working to "increas[e] the use of ... product in hospitals and through physicians' recommendations" and maintain relationships with doctors — precisely what sales representatives do today — the Department reasoned that the detailists performed "administrative" work because, among other things, they used "discretion and independent judgment," and had "skills or knowledge acquired through special training or experience." *Id.*

In 2004, the Department reaffirmed that, consistent with "current law," an "administrative" employee's "primary duty must 'include' the exercise of discretion," and expressly rejected a requirement that the employee "'*customarily and regularly*' exercise discretion." 69 Fed. Reg. at 22,142-22,143 (emphasis added); *see* 29 C.F.R. § 541.202(a)(3). Notably, one of the cases the Department invoked to illustrate the proper application of the "discretion" requirement involved insurance marketing representatives closely analogous to Novartis's sales

representatives. In *Reich v. John Alden Life Insurance Co.*, 126 F.3d 1 (1st Cir. 1997), the First Circuit highlighted the representatives' freedom to "choos[e] which agents to contact on any given day" and their "rel[iance] on their own knowledge of an agent's business to help tailor proposals for the agent's end-customers." *Id.* at 13. Although the representatives applied techniques "learned in training sessions," the important point was that they "nonetheless exercise[d] discretion in applying this instruction — for instance, in determining which agent may have an interest in that product, or in fashioning bid proposals that meet the needs of the agent's customers." *Id.* at 14.

That interpretation of the discretion requirement makes particular sense because the limits on sales representatives' discretion reflect FDA policies and companies' strong commitment to comply with those policies — not considerations relevant to labor law or the purposes of the FLSA. Just as it defies reality to treat sales representatives as not engaged in sales because the need for a prescription affects the mechanics of the transaction, it makes no sense to conclude that they lack meaningful discretion because industry-specific compliance considerations limit and channel their discretion. *See Roe-Midgett v. CC Services, Inc.*, 512 F.3d 865, 875 (7th Cir. 2008) ("independent judgment is not foreclosed by the fact that an employee's work is performed in accordance with strict guidelines").

The Department's *amicus* brief is irreconcilable with its previous interpretation of the discretion requirement. In place of its previous emphasis on the "includes" standard, the Department now

contends that employees must exercise a greater quantum of discretion. *Some* discretion used to be sufficient; now, suddenly, it is not. This change is critical, because no one can dispute that sales representatives exercise at least some discretion. The Second Circuit reasoned, for example, that although Novartis's sales representatives are "ab[le] to answer questions," "develop a rapport with a physician," "remember past conversations," and "recognize when a message has been persuasive," that was insufficient because those skills are "honed in [sales representatives'] Novartis training sessions." App. 34a. Without specifying how much discretion would be enough, the Second Circuit deferred to the Department's view that the amount exercised by Novartis's sales representatives was not "sufficient[]." App. 35a.[5]

Nothing but the Second Circuit's extreme version of *Auer* deference can explain the anomalous decision below. Under the Department's longstanding view, the undisputed existence of some discretion is the end of the analysis. The D.C. Circuit's decision in *Robinson-Smith v. Gov't Emps. Ins. Co.*, 590 F.3d 886 (D.C. Cir. 2010), perfectly illustrates that understanding: The "parties disagree[d] on how much discretion the [auto damage] adjuster exercises," but that was beside the point because "no one disputes that he exercises 'some.'" *Id.* at 893-94. The D.C. Circuit thus held

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[5] As the Petition explains, the Third Circuit held, in contrast, that a Johnson & Johnson sales representative was an exempt administrative employee. *See* Pet. 21-22 (discussing *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d. Cir. 2010)).

adjusters to be exempt "[e]ven assuming ... that the vast majority of adjusters' work" did not require discretion. *Id.* at 894. The Second Circuit erred by allowing the Department to use an *amicus* brief to upend settled expectations by abandoning that longstanding interpretation and imposing retroactive liability.

II. CERTIORARI TO CONSIDER THE PROPER APPLICATION OF THESE EXEMPTIONS IS CRITICALLY IMPORTANT.

In light of the pharmaceutical industry's universal and longstanding practice of treating sales representatives as exempt, the Second Circuit's decision threatens untold costs in unforeseen liability. Counsel for respondents estimates that damages from this suit alone (involving 2,500 sales representatives) could reach $100 million. *See* Mark Hamblett, *2nd Circuit Finds Novartis Drug Reps Not Exempt From Overtime Law*, http://www.law.com/jsp/article.jsp?id=1202463314353 (July 7, 2010). There are tens of thousands of pharmaceutical sales representatives working in the United States. *See* Linda Wang, *Prescription For Success In Sales*, 85 Chem. & Engineering News, no. 8, at 43-46 (2007). Over a dozen FLSA cases have been filed in recent years against pharmaceutical companies, "almost all cast as class actions." Steven Blackburn, *In re Novartis Wage & Hour Litigation*, in Top 20 Food and Drug Cases, 2009 & Cases To Watch, 2010, at 169 (John B. Reiss ed., 2010). Moreover, the impact of the Second Circuit's decision could be even greater, because many States' wage and hour laws are interpreted to track the FLSA. *E.g.*, 820 Ill. Comp. Stat. 105/4a(2)(E) (West 2000) (state overtime

laws inapplicable to white-collar workers "as defined by or covered by the Federal [FLSA]"). Because the decision below, if left unreviewed, "could have a wide-ranging impact, suddenly imposing upon businesses across the country a [substantial] liability," this Court should grant certiorari to determine whether such a "groundbreaking" result is truly warranted. *See Singh v. City of New York*, 524 F.3d 361, 369-70 (2d Cir. 2008) (Sotomayor, J.).

Beyond the financial exposure, a change in the exempt status of sales representatives would have broader ramifications. It is exceedingly unlikely that biopharmaceutical companies could shift to treating sales representatives as non-exempt without altering the fundamental nature of the position. For example, if non-exempt, sales representatives would have to maintain more precise work hours and would lose the flexibility they currently enjoy. *Cf. Jewel Tea Co. v. Williams*, 118 F.2d 202, 207-08 (10th Cir. 1941). Other attractive aspects of sales representatives' jobs could also be revisited, including the commission model that allows motivated and skilled sales representatives to earn compensation well into the six figures.

Before pharmaceutical companies potentially undertake far-reaching restructuring in response to the decision below and the Department's new position, this Court should grant certiorari to consider whether the Second Circuit was correct to defer to the Department's *amicus* brief. The decision below also threatens to upend settled understandings in other industries as well. If only a technical transfer of title satisfies the "outside sales" exemption, many businesses will be affected. *See, e.g., Gregory*, 555 F.3d at 1303-04 (title marketing

companies); *Wirtz v. First Nat'l Bank & Trust Co.*, 365 F.2d 641, 645 (10th Cir. 1966) (management company renting office space). Likewise, if "some" discretion is no longer sufficient under the administrative exemption and an undefined but higher quantity of discretion is required, employers in all manner of industries face uncertainty about a vast spectrum of employee positions. *See, e.g., John Alden*, 126 F.3d at 13 (insurance salespersons); *Robinson-Smith*, 590 F.3d at 892 (auto damage adjusters). The Court should grant review of these important and cleanly-presented questions now.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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